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No. 673.

Supreme Court of the United States

OCTOBER TERM 1946.

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

GREYVAN LINES, INC.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF APPELLEE, GREYVAN LINES, INC.

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INDEX.

Statement of the case 3
Questions presented 6
Findings of facts require affirmance of judgment ... 7
The truckman's contract 8
Agreement is indivisible 9
History and reasons for the independent contract 10
Advantages of operation under independent contract 14
Union contracts 14
Answer to appellant's brief 17
(a) In statement of facts 17
(b) Answer to specifications of errors to be urged 20
(c) Answer to summary of argument 21
Argument 23
Findings of fact establish independent contract relationship 23
Conclusions of law supported by reason and authority 24
Contract is determinative of intention of parties 33
History of the act dispels any construction that plaintiff is taxable with respect to any part of the payments made to its independent contractors: or with respect to the wages paid by the independent contractors to their helpers whom they hired, paid and fired 34
Assessments were arbitrarily made 39
Regulations of treasury department 43

The issue of control 45
Control v. Independent contracts 46
The manual for truckmen 48
Parking lots 52
Dispatcher 53
Regulations of the Interstate Commerce Commission 53
Insurance 53
Using equipment for other purposes 54
Markings on equipment 54
Contract terminable on notice 55
Exclusive use of equipment 56
Compliance with regulations of I. C. C. 58
Application to the Interstate Commerce Commission 59
Alleged agreement with respect to the enforced returns 67
Discussion of cases cited by appellant 68
Tort case 68
Decisions under state unemployment act 69
Decisions under other statutes 68
Decisions under Federal Unemployment Insurance Act 69
Conclusion 70
Appendix A—Discussion of the state of the record. 72
Appendix B—List of applicable decided cases 77
Transportation cases 77
Decisions by Circuit Court of Appeals involving unemployment, social security and similar acts 77
Decisions by District Courts involving unemployment, social security and similar acts ... 79
Decisions under state unemployment acts 80

Citations.

American Ins. Co. v. Scheufler, 129 F. 2d, 143 7
American Federation of Labor v. Swing, et al., 312 U. S., 321, 85 L. Ed., 855 15
American Oil Co. v. Fly, 135 F. 2d, 491 55
Allied Van Lines, 46 M. C. C., 159 65
Acme Fast Freight, Inc., v. United States, 309 U. S., 638 66
Bereth v. Sparks, 51 F. 2d, 441 8
Burruss, et al., v. Early, Coll., 44 F. Supp., 21 (1942) 27
Buckstaff Bathhouse Co. v. McKinley, 308 U. S., 358, 84 L. Ed., 322 35
Brownligg v. Allvine Dairy Co., 137 Kas., 209, 19 Pac. (2d), 474 (1933) 55
Commercial Motor Freight, Inc., v. Ebright, 143 O. S., 127, 54 N. E. (2d), 297, 161 A. L. R., 1321 ..... 25, 39, 41
Crossett Lumber Co. v. McCain, Commissioner of Labor, 205 Ark., 631, 170 S. W. (2d), 64, 174 S. W. (2d), 114, 206 Ark., 51 ..... 31, 55, 58
Coviello v. Industrial Commission, 129 O. S., 589, 196 N. E., 661 55
Casement v. Brown, 148 U. S., 615 68
Columbia River Packers Assn. v. Hinton, 315 U. S., 143, 86 L. Ed., 750 16
Cohn v. Hartford, 130 Conn., 699, 37 A. (2d), 237 17
Craige v. Austin Powder Co., 91 F. 2d, 664 33
Chicago, Rock Island & Pacific Ry. Co. v. Bond, 240 U. S., 449, 60 L. Ed., 735 57
Dixie-Ohio Express Co., 17 M. C. C., 735 59
Electrolux Corp. v. Board of Review, 129 N. J. L., 154, 28 Atl. (2d), 219 69
Ellis v. Associate Industries Ins. Corp., 24 F. 2d, 809, aff. 16 F. 2d, 464 33

Emard v. Squire, Coll., 58 F. Supp., 281 (Wash. Dist. Ct., Jan., 1945) 19
Fawcus Machine Co. v. United States, 282 U. S., 375, 75 L. Ed., 397 44
Fidelity & Casualty Co. v. Industrial Commission, 191 Cal., 404, 216 Pac., 578 (1923) 56
Fisher Body Co. v. Wade, 45 O. A., 263, 187 N. E., 78 56
Gary Theatre Corp. v. Col. Picture Corp., 120 F. 2d, 291 8
Glenn v. Standard Oil Co., 148 F. 2d, 51 58
Glenn v. Beard, 141 F. 2d, 371 ..... 34, 69
Gulf Refining Co. v. Brown, 93 F. 2d, 870 68
Grace v. Magruder, 148 F. 2d, 679 69
Gabel Mfg. Co. v. Murphy, 390 Ill., 455, 62 N. E. (2d), 401 31
Halkias v. Wilkoff Co., 141 O. S., 139, 145, 47 N. E. (2d), 199 55
Hedges v. Johnson, 52 F. Supp., 488 65
Iselin v. United States, 270 U. S., 245, 70 L. Ed., 566 42
Industrial Commission v. McAdow, 126 O. S., 198, 184 N. E., 759 34
Jones, Collector, v. Goodson, 121 F. 2d, 176 ..... 28, 36
Lehr, Inc., v. Brown, 91 S. W. (2d), 693 (Texas, 1943) 59
Los Angeles Athletic Club v. United States, 54 F. Supp., 702 47
Lewis v. Transfer Co., 119 S. W. (2d), 106 55
Howard W. Luff Co. v. Capece, 61 F. 2d, 635 33
Metcalf & Eddy—Partnership v. Mitchell, 269 U. S., 514, 521 47
Mutual Trucking Co. v. United States, 141 F. 2d, 655 ..... 6, 41
McDermott v. State, 196 Wash., 261, 82 Pac. (2d), 568 30

Magnolia Petroleum Co. v. Griych, 176 S. W. (2d), 435, 206 Ark. 352 ..... 34, 55
Merchants Mutual Insurance Co. v. Allen, 126 U. S., 67 17
Nevius, Inc., v. Rothensis, 151 F. 2d, 189, aff., 58 F. Supp., 460 ..... 28, 58, 70
Norwegian Nitrogen Products Co. v. United States, 288 U. S., 294, 77 L. Ed., 796 39
National Labor Relations Board v. Hearst Publications, 322 U. S., 111 ..... 48, 69
Norton v. Day Coal Co., 192 Iowa, 160, 180 N. W., 905 58
Ozark Minerals Co. v. Murphy, Director, 384 Ill., 94, 51 N. E. (2d), 197 30
Pick Manufacturing Co. v. General Motors Corp., 299 U. S., 3, 81 L. Ed., 4 8
Radio City Music Hall Corp. v. United States, 136 F. 2d, 715 ..... 43, 47, 51
Riggs v. Haden Co., 127 Tex. 314, 94 S. W. (2d), 152 55
Railroad Co. v. Hanning, 15 Wall., 649 68
Ridge Country Club v. United States, 135 F. 2d, 718 70
Robinson v. B. & O. Rd. Co., 237 U. S., 84 56
Steward Machine Co. v. Davis, 301 U. S., 548, 81 L. Ed., 1291 ..... 35, 36
Schroepfer v. Abell Co., 48 F. Supp., 88, 96, aff. 138 F. 2d, 111, cert. denied 321 U. S., 763 47
Schatz Pollock Woolen Co. v. Murphy, Director, 348 Ill., 218, 51 N. E. (2d), 147, 148 47
Standard Oil Co. v. Glenn, Coll., 52 F. Supp., 755, aff. 148 F. 2d, 51 51
State, ex rel. v. Commercial Motor Freight, Inc., 48 N. E. (2d), 898 55
Sater v. Cities Service Oil Co., 291 N. W., 355 (Wis.) 34
Singer Mfg. Co. v. Rahn, 132 U. S., 518 68

Texas Co. v. Higgins, 118 F. 2d, 636, aff. 32 F. Supp., 428 ..... 47, 55, 70
Tex[illegible] Beeless, 185 Miss., 799, 187 So., 880 ..... 32, 36
Texas Co. v. Brice, 26 F. 2d, 164 ..... 33, 55
Thompson etc. v. United States, 321 U. S., 19, 88 L. Ed., 513 ..... 63, 65
Underwood v. Commissioner, 56 F. 2d, 67, 71 47
United States v. Carolina Freight Carriers Corp., 315 U. S., 475 63
United States v. Rosenbloom Truck Lines, 315 U. S., 50, 86 L. Ed., 671 (1942) 63
United States v. Mutual Trucking Co., 141 F. 2d, 655, aff. 51 F. Supp., 114 ..... 21, 64
United States v. The Vogue, Inc., 145 F. 2d, 609 69
United States v. Commercial Credit Co., 286 U. S., 63, 76 L. Ed., 978 8
United States v. Aberdeen Aerie, 148 F. 2d, 655 ..... 28, 70
United States v. Davis, 154 F. 2d, 314 ..... 51, 59, 69
Williams v. United States, 126 F. 2d, 129 ..... 24, 34, 48, 51, 62, 70
Walling v. Rutherford Food Corp., 156 F. 2d, 513 48
Williams v. Terminal Co., 315 U. S., 386 69
Wilson v. Merchants Loan & Trust Co., 183 U. S., 121, 126 17
Western Express v. Smeltzer, 88 F. 2d, 94 68
Wright, The Francis, 105 U. S., 381 17
Yellow Cab v. Magruder, Coll., 49 F. Supp., 605, aff. 141 F. 2d, 342 ..... 27, 43
27 Amer. Jur., p. 488, §7 46
53 Amer. Jur., 795, §1142 17
U. S. Code, Title 28, §391 7
Motor Carrier Act, U. S. C. A., Title 49, §303 60
Federal Rules of Procedure, §52 (a) 7

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BRIEF OF APPELLEE, GREYVAN LINES, INC.

Greyvan Lines, Inc., submits this brief in support of the judgment of the District Court of the United States for the Eastern Division of the Northern District of Illinois (R., 228; Findings of fact and conclusions of law, R., 219) and affirmed by the Circuit Court of Appeals for the Seventh Circuit, 156 F. 2d, 412. Emphasis is ours, unless otherwise noted.

The transcript of record is in two volumes, Volume 1 being an exact duplicate of the printed transcript of record filed in the Circuit Court of Appeals, with the opinion of that court added (R., 253-260); and Volume 2, beginning with page 265, which consists of exhibits, the originals of which were filed in the Circuit Court of Appeals (R., 238) and which have not heretofore been printed.

Appendix A attached is a discussion of the state of the record and a description of the exhibits offered in evidence. Such description refers to both exhibits offered in evidence by the appellee and the lengthy exhibits offered in evidence by appellant.

Appendix B contains a list of applicable decided cases which establish a definite trend of the law in line with the rules which we maintain should be here applied, and against those for which the appellant contends. The trend has been substantially unanimous. No questions are involved in this case as decided by the lower courts with which the decision under review is in conflict. Manifestly, we are not able to separately discuss the contents of all of the cases cited in Appendix B and keep this brief within reasonable limits.

STATEMENT OF THE CASE.

The case is as well stated in the "Findings of Facts" (R., 219) as we could possibly restate it; especially with regard to the method of operation of the company's business (R., 219 et seq.) and the method of arriving at the arbitrary assessments. (R., 223, 226.)

In brief summary, plaintiff is a common carrier by motor vehicle (R., 137) authorized by the Interstate Commerce Commission (R., 389) to transport household and specific other goods throughout 38 states in the United States. It is duly authorized to conduct that business under the Motor Carrier Act of Congress and under the supervision of the Interstate Commerce Commission, with which its tariff charges are duly filed. (R., 137, 219.)

Exemplary of the uniform contract (R., 131) between the company and all its contract truckmen is the contract with M. R. Parsley of Indianapolis (R., 265), whose testimony appears at R., 120. These contracts were executed with owners of tractor-trailer outfits suitable for use as moving vans throughout the territory; they were not confined to Chicago, the home office of the company or to Illinois.

The company maintained branch offices and agents by and through whom (R., 119) and by means of advertising (R., 368) the business was obtained, and divided the gross revenues with the truckmen on substantially a 50-50 basis, except that if the truckmen qualified as most of them did, for a bonus, they were paid up to an additional 3%, (R., 119, R., 272, 273). For certain operations, such

as hoisting heavy pieces, including pianos, the truckman is paid up to 100% of the tariff charge, (R., 135, R., 272). Payments to the truckmen run as high as $1700 monthly (R., 275, 276). Compare with company drivers at union scale of $36.00 and $42.50 per week (R., 25) base pay, who, if he were a good man working full time, would not earn more than $185.00 to $200.00 a month (R., 177).

At pre-trial conference, the court directed that the case be submitted on stipulation (R., 136, 137) to which the appellant agreed to the extent set forth in the stipulation reproduced at R., 22-79. Oral testimony was offered by Greyvan Lines, Inc., in addition to the stipulation, to show the method and performance of the independent contracts. (See Exhibits B to H, R., 274 to 276, and Truckmen's Rate Schedule, R., 272 to 274.)

During the times involved in the assessment period (January, 1937, through first quarter of 1942 (R., 23, 24)) plaintiff was an "employer" within the meaning of the Social Security Acts of Congress and duly paid assessments levied on all of its employees. The amended and supplemental returns (enforced returns) (R., 28, 93) are with respect to its "truckmen" who operated under an independent contract (R., 139, 265), whose names are specified in the enforced returns (R., 45-93) and of certain persons employed by such truckmen, whose names are unascertainable (R., 137) but are lumped in the enforced returns under the designation, "Dummy". (R., 62.)

Plaintiff put on the stand six witnesses, three of them being truckmen Bossert, Foote and Parsley (R., 96 to 120), and Arthur F. Prante, the company's dispatcher,

(R., 144) Allen F. Scherfzberg, assistant secretary, who knew the details of the operation, (R., 160) and Walter W. Shearer, the company's treasurer, (R., 130) who testified as to the method of handling the payment of accounts to the truckmen.

As to truckmen, we had five in the court room ready to testify cumulatively, to the evidence produced mainly by truckman Bossert. The court stated that the testimony of truckman Bossert was sufficient, that he did not care to hear cumulative evidence and said "let the record show that the court does not desire to hear any cumulative testimony" and that "the five will testify to the same thing if they were asked the same questions." (R., 121.)

As against this evidence, the appellant offered an unsuccessful truckman by the name of Joe Garrison, whose testimony was not essentially at variance with the evidence offered by the plaintiff. He testified that, in fact, he refused to receive a load when tendered (R., 191) and after refusing to accept the load and quitting, was persuaded to continue another month when he finally quit of "my own accord". (R., 192.)

The only other witness presented by the appellant was Mr. Aage Sahlgaard (R., 192) who was a garage man and who, for a time, made examination of the trucks used in the business of the company for "preventitive inspections". (R., 193.) This inspection was for safety purposes (R., 197), was paid for by the owners of the trucks themselves (R., 197), was short-lived (R., 195) and was dropped because some of the older operators did not want it. (R., 196.)

Much immaterial matter has been included in the printed transcript. (See Record, pp. 208-218, 232 to 237, 240-249.)

Included in the transcript by designation of appellant (R., 250), is Treasury Department Ruling, dated July 22, 1944. (R., 218.) That ruling shows that on the authority of **Mutual Trucking Co. v. United States,** 141 F. 2d 655, prior rulings involving owner-operated vehicles have been revoked and that "the bureau has accepted the decision of the court as controlling in all cases involving the services of motor drivers".

As a matter of public record, it may be ascertained and determined that under similar circumstances as here presented refunds of taxes paid have been made by the treasury department in many instances.

QUESTIONS PRESENTED.

The case hinges upon the point as to whether or not the **"truckmen"** were **"employed"** by plaintiff for a **"wage"** within the meaning of the Social Security Acts which provide that there shall be "levied, collected and paid upon the income of every **individual** a tax equal to the following percentages of the **wages** received by him * * * with respect to **employment."**

Effective January 1, 1940, amendments to Sections 1426 (b) and 1607 (c) of the Social Security Acts under consideration define employment as meaning "any service * * * by an employee **for the person employing him** * * *". Similar language may be found in Section 1607 (a).

The second point, correctly decided by the lower courts, involves the arbitrary method of arriving at the assessments; and it is denied that the "amount of taxable wages" was determined under any agreement between the taxpayer and the collector. It is denied that any "wages" were paid.

The point involved in the case and decided correctly by the District Court is:

There was no employment involved, no wages were paid, and the act had no application whatsoever.

The assessment was arbitrarily arrived at.

The Circuit Court of Appeals affirmed in both respects.

FINDINGS OF FACTS REQUIRE AFFIRMANCE OF JUDGMENT.

The findings are not only supported by substantial evidence, but by uncontradicted evidence. The attempt to rebut the evidence of appellant passed to the vanishing point. The district court gave the evidence of Joe Garrison (R., 180) little, or no, credence.

Section 52 (a) of the Federal Rules of Procedure provides:

> "Findings of fact shall not be set aside unless **clearly erroneous** and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."

American Ins. Co. v. Scheufler, 129 F. 2d, 143.

Judgments may be reversed only for errors affecting **substantial rights** of the party.

U. S. Code, Title 28, Sec. 391.

Findings of fact may not be interfered with when based on substantial evidence.

Bereth v. Sparks, 51 F. 2d, 441;
Gary Theatre Corp. v. Col. Picture Corp., 120 F. 2d, 891.

Under the established rule, this court accepts the findings of the District Court concurred in by the Circuit Court of Appeals, **unless clear error is shown.**

Pick Manufacturing Co. v. General Motors Corp., 299 U. S., 3, 81 L. Ed., 4;
United States v. Commercial Credit Co., 286 U. S., 63, 76 L. Ed., 978.

The Truckman's Contract.

The evidence has shown performance of the independent contract (R., 97, 121, 131, R., 265). The relationship created was contractual and does not arise from tort.

The contract truckman provides all of the equipment, together with necessary pads, etc., required in the transportation which he undertakes (R., 117, 147). The truckman is obliged to hire (and he alone fires) any assistants required in the transportation, loading, unloading and delivery of shipments, and such employees are under his sole direction and control (R., 135). He furnishes, at his own expense, all packing and crating materials; public liability and property damage insurance upon his motor trucks, which insurance must cover jointly the liability of the company and the truckman "as their respective interests may appear"; provides a fidelity bond covering himself and his substitute drivers in the penalty of $1000.00 to cover any default in accounting for

freight charges collected; must make a cash deposit of $250.00 with the company to secure payment of damage claims for which he is liable and payment of amounts charged to his account on his direction and order, including gasoline purchased on credit cards; must account to the company for the cost of any or all loss or damage to the goods, wares or merchandise occurring while the same are in his custody, possession or control, other than such as are covered by cargo insurance provided by Greyvan. The company may charge to his account any loss, damage or expense which it may sustain because of his acts, and he agrees to indemnify the company therefrom; he agrees to keep his motor equipment in good mechanical and proper operating condition at all times, and to keep it clean. He pays the cost of operation of said motor equipment, (R., 119, 148) including property taxes, resident vehicle license, oil, fuel, tires, repairs, and all other costs incident to his ownership or operation; agrees to comply with all federal and state laws and regulations and the ordinances of each and every city, village and municipality where the trucks may be operated, and the rules and regulations of any governmental agencies having jurisdiction over the highway, including licensing, speed, etc., laws. He pays his own fines for any violation of laws for which he is responsible.

Agreement Is Indivisible.

The agreement is indivisible. While it necessarily requires his personal service or that of an authorized substitute, in order to perform the agreement, yet no specific sum is set apart for his labor in connection therewith. A

truckman who has business ability can make far more in the performance of this contract than he could if he were employed on a wage under a contract of hire. (R., 177.) The truckmen engaged by this company do make more than their employees under contract of hire make. He makes a profit, the same as if the independent contractor were engaged in the execution of an independent contract for the construction of a house. If a contractor in the building of a house is a good manager, he will have a profit above and beyond his own labor; if he is a poor manager, he may lose money and realize nothing for his personal service involved. So with the "truckman" under this contract.

History and Reasons for the Independent Contract.

This company was using independent contractors in the transportation business long prior to the enactment of the Federal Motor Carrier Act and the Social Security Acts. (R., 160, 161, 176, 177.)

The company was organized in 1929 and independent contracts were executed by it as early as the year 1930.

Singularly enough, the main reason for the adoption of the system of independent contractors was the lack of control which the company was able to exercise over an employee because of distance traveled. (R., 176.) Hence, there was developed a system whereby the transportation could be contracted to responsible owners of suitable equipment (R., 161) and the results accomplished by contract rather than by unsupervised employment.

Labor is necessary (1) in loading and unloading the goods into and out of the truck; and (2) in driving the

truck from point of origin to destination. (R., 105.) Under the system developed the independent contractor has the option of performing this labor himself or of employing others to do it. (R., 135.) Wherever the goods may be loaded, or unloaded, he may, if he desires, employ labor at that point for that purpose and he may only supervise and direct the loading or unloading; or, he may do part and hire the rest. The option is his. He may drive the truck himself; or he may hire someone to do it. (R., 148.)

The company found that an independent contractor, who owned his own equipment, gave it better attention, kept it in repair, and performance was often superior to that of its employees. (R., 176.) Consequently, it further developed a system whereby the independent contractors were rewarded for greater efficiency in performance by the payment of bonuses. (R., 114, 170; R., 272, 273.) The independent contractor had an opportunity to better himself far beyond what he could accomplish as an employee, and in bettering himself he promotes the interests of the company. An independent contractor, owning his own equipment, is interested in maintaining that equipment at its highest degree of excellence. Further, the more he does, the more his income. By engaging a driver, he can keep his truck moving during all the time permissible under regulations. He has no interest to dilly dally on the job since an idle truck makes him nothing, whereas an employee, in operation of company equipment, may have the opposite inclination. (R., 176, 177.)

Greyvan Lines, Inc., has no localized operation. (R., 340 et seq.) It maintains no garages or terminals at any

location. It operates from the homes of its customers and warehouses throughout the country, from whence it receives goods for transportation, or to which it makes delivery. Its operations covers thirty-eight states and the District of Columbia. The company may, for example, occasionally have a load for transportation from the vicinity of New York to El Paso or other far away points; and frequently loads from Kansas City, Minneapolis and Chicago to Miami, Tampa and other southern points; and loads originating en route may take the truckman to points far distant from the point of origin. The requirements of the transportation may take the equipment into territory which may be sparsely populated, and where the company cannot, under any circumstances, maintain equipment and personnel sufficient to supervise operations by its own employees.

The moving of household goods differs from the transportation of ordinary freight. In the former, the truckmen come into direct contact with the family; must please the housewife in every particular and be a diplomat in general. (R., 113, 163.) In fact, the moving of household goods approaches a custom service. The company cannot control the need or demand for such service, nor can it control the origin or destination of such shipments. They must take the business where and when it is available. The company is obliged to so manage the business as to have motor vehicle equipment available to meet the shipper's demand. (R., 145, 146.) Consequently, any one piece of motor vehicle equipment may be dispatched on irregular routes and on schedules most suiting the convenience of the shippers, to any part of the 38 states served by the company. And so, it is

not uncommon or infrequent that any one piece of motor vehicle equipment may be away from Chicago or points of origin two or three months. (R., 103.)

It is, therefore, impossible for the company to exercise supervision over the details of performance, the method and manner of performance, or the "physical conduct" of the driver of the motor vehicle equipment.

It is impossible to determine, with accuracy, the cost of operating equipment from one distant point to another under varying road conditions, climatic conditions, terraine, etc., if operated by an employee, particularly when the equipment may be on the highways without returning to base, for weeks at a time. (R., 146.) When the owner is personally in charge of the equipment, it is his loss when not operated economically and up to its full capacity.

Efficiency in loading is important. Unless efficiently loaded, neither the independent contractor or the company realizes maximum income from the transportation. The system of independent contracts in force encourages maximum use of available space and efficient loading and unloading.

The incentive to a man engaged in his own business to make a profit from the operation of his own equipment, creates in him a desire for excellence in performance. This indicates the necessity for and the advisability of, the company operating under the system of independent contractors wherever it can. (R., 163, 176.)[1]

The truckman may choose his own routes. He is not obliged to follow any particular route. He may depart

[1] The company is now operating exclusively with owner-operated equipment under contract.

from the shortest possible route if he desires, the excess cost being his to bear. In Pennsylvania, he may take the new super highway, paying the added cost of $7.50 for the use of it, or he may take the public highway. The option and the expense is his. (R., 103, 148.) **No control of the method and manner of operation of equipment is, or can be, exercised. These truckmen therefore are in a business of their own and not in any employment for Greyvan Lines, Inc.** (R., 163, 226, par. 24.) **Mutual Trucking Co. v. U. S.**, 51 F. Supp., 114, aff'd 141 F. 2d, 655.

Advantages of Operation Under Independent Contract.

These advantages were discussed by Mr. Prante in his testimony wherein he outlines nine different respects in which the contract truckmen differed from the employees in methods and purposes of operation. (R., 146 et seq.) A contract truckman could make more money for himself than if he were employed on an employment basis. Bossert, (R., 102); Parsley, (R., 126); Schertzberg, (R., 177) (and see also Exhibits J and K, R., 275, 276).

Union Contracts.

Counsel for the appellant refer to the Union Contracts: (R., 368, 374.) They do not refer to the fact that the contract (R., 368) covers the truckmen who "own and operate their own equipment and distinguish between such truckmen and employees of the company (R., 369, Section 1); and the supplemental contract (R., 374) was subsequently added to cover employees hired by the

[1] For distinctions between employees and owner-operators, see R., 146 et seq.

company to drive company owned trucks." Those contracts are immaterial in any aspect of the case. They establish no control and certainly do not establish a wage upon which a tax can be assessed when none was paid. The evidence will be found at R., 111, 143, 172 and 174.

We are of the opinion that this court will take judicial notice that, in these days, union affiliations, including the "closed shop", constitute a part of any contract—whether wanted or unwanted. Membership in a union is consistent with the independent contractor relationship. This court has so decided in **American Federation of Labor v. Swing, et al.**, 312 U. S., 321, 85 L. Ed., 855, originating in Illinois. In that case there was no immediate labor trouble between the employer and employee, but the trouble had arisen over an attempt to unionize a non-union shop. Employees of other employers had attempted to picket the beauty shop of the defendant. The following quotations from the opinion by Mr. Justice Frankfurter demonstrates the fact, for the court there says:

> "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small **as to contain only an employer and those directly employed by him.** The interdependence of economic interests of all engaged in the same industry has become a commonplace." (Op., p. 326.)

Compare also, the case of **Emard v. Squire, Collector**, 58 F. Supp., 281 (Wash. Dist. Ct., January, 1945), where fishermen "whose compensation was contingent upon a certain share of the revenue received from the gross

catch of fish" (Op., p. 286) and who had employees covered by a union contract, were held, notwithstanding, to not be subject to the Social Security Acts. Assessments were there made as in this case and judgment for recovery of the tax paid was awarded. The Court there held:

> "Where contract between union and salmon packing company insofar as it covered fishermen related to price per fish, deduction of union membership dues, etc., but fishermen were not subject to orders of the company as to when, where, or how they should catch fish, nor as to conditions under which they would carry on their operations, the fishermen were 'independent contractors' and not 'employees' within Federal Insurance Contributions Act."

The **Hearst Publications** case was held to have no application.

The impositions of labor unions cannot affect the contractual relation between Greyvan and its truckmen. It cannot create a "wage" when none otherwise exist. It cannot impose a tax when the payments to its contractors are nontaxable. The union contract, in itself, specifically recognizes the independent contractor relationship existing between Greyvan and its truckmen. (R., 369, Sec. 1.)

Compare Columbia River Packers Assoc. v. Hinton, 315 U. S., 143, 86 L. Ed., 750.

ANSWER TO APPELLANT'S BRIEF.

(a) In Statement of Facts.

(a) It is not the function of findings of fact (which are (B., p. 3) conceded to be "not inaccurate so far as they recite facts") to recite all the evidence. It is the function of findings of fact to state the ultimate facts upon which the judgment is based.[3] The findings do recite in detail much of the method of operation of the company and the method of arriving at the assessment. We cannot agree with the statement that the findings of fact "give no real picture of how respondent's business is carried on". To the contrary, the findings of fact (R., 219-227) were designed to and do state in great detail all the essential facts of the case. It was not necessary that the court recite all of the evidence in the findings, nor to give his reasons for so finding. The court was evidently not impressed with the evidence of Joe Garrison (R., 180), (an unsuccessful truckman whom he had before him and could best judge his credibility from his manner and appearance) and the testimony of Sahlgaard, as well as much of the testimony of Garrison, was immaterial to the case. Garrison's testimony was disputed in several respects (R., 175, 181). The findings were complete and are therefore controlled by Sec. 52 (a) of the Federal Rules of Procedure.

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[3] See 53 Amer. Jur., p. 795, §1112, where it is said:

"It is well settled that findings of fact to be made by the trial courts in cases tried without a jury should be findings of the ultimate facts upon which the law must determine the rights of the parties, rather than evidentiary facts."

Compare *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S., 121, 126; *The Francis Wright*, 105 U. S., 381, 387.

The lower court is bound to find the ultimate facts only, and not mere incidental facts amounting only to evidence bearing upon ultimate facts. *Merchants Mutual Insurance Co. v. Allen*, 121 U. S., 67; *Cohn v. Hartford*, 130 Conn. 699, 37 A. 2d, 237, 152 A. L. R., 604.

An examination of the contract (R., 265) is convincing that it has no elements of a contract of employment, but is strictly one creating an independent contractor relationship.

Note reference is made to R., 187, where Joe Garrison was not granted the privilege to have somebody else deadhead his truck from Virginia to Chicago. The contract requirement was that prior approval should be given to assistant drivers (R., 266). The reason therefore is apparent. Being no more successful than he was, his selection of an assistant might involve the carrier in vicarious liability for negligent operation of the van on the highways, under the Rules and Regulations of the Interstate Commerce Commission. That fact establishes no employment relationship and the request was a direct departure from the contract. His evidence was also subject to the scrutiny of the court as to veracity.

Certainly, the fact that truckmen took schooling before they started as contract truckmen cannot affect the existence of an independent contract subsequent to which time they acquired all equipment and began operating under the independent contract. The schooling was paid for by the company on employment basis. (R., 96, 97.) Many of the truckmen graduated from employment to contractors when they were able to acquire equipment of their own.

Some discussion is devoted to the operations of the chief dispatcher. Counsel for appellant overlooked the necessity in a large operation such as this of cooperation which, as evidenced in many businesses, does not require employment. Necessarily cooperation between

the truckmen and the company, including its dispatcher who was obliged to know the whereabouts of their trucks, whether operated by the company or by the truckmen was required. However, counsel are mistaken wherein they conclude that the dispatcher exercised control of details of the operation. His job was to know where the trucks were at all times and advise the truckmen when and where his next load would be available. (R., 145.)[4]

Advances to truckmen, which did not exceed a certain portion of their contract earnings, were made from time to time as illustrated by Exhibit G. (R., 274.) The fact that such an advance was made certainly does not affect the independent contractor relationship.

Regulations of the Interstate Commerce Commission (and the statute forbidding discrimination) require the carrier to either collect COD, or have approved credit. Collection of the accounts not on credit rating was a part of the contract itself. The contract could not be performed unless and until the truckman did what was required of Greyvan under the regulations and the law.

Some truckmen wore uniform, others did not. (R., 112, 170, 171.)

The truckmen had the right to take time off as they desired (R., 115, 117) and to refuse to accept loads, and some did. (R., 146, 147.)

[4] "There is no evidence that the dispatcher, or any other employee, instructed the owner-operators *how* to do this work. They knew *how*. He did not know how. (R., 158.) They needed no instructions in that respect. (R., 195). The truckmen needed only to know the *what* and *when*. This information was supplied to them by the dispatcher and by the 'Instructions to Truckmen.'" (Plaintiff's Exhibit B, R., 275.)

(b) Answer To Specifications of Errors To Be Urged.

We maintain that the findings of fact and conclusions of law entered by the District Court, and unanimously affirmed by the Circuit Court of Appeals in a most convincing opinion, are correct and there is no basis for reversal.

With reference to Specification 2, we assert that neither the District Court nor the Circuit Court of Appeals failed "to consider the economic facts of the relationship between the parties" insofar as they had application. Necessarily, the "economic facts" have no place in the consideration of this case, if the finding of the lower court that an independent contract relationship existed, is correct. As to economic facts, may we point out that the basic wage of an employee was only $36.00 per week for a part of the period covered by the assessment, and $42.50 for the remainder of the period (R., 177); that a "good man" could make a wage of only $185.00 to $200.00 per month if he worked full time (R., 177); whereas an average contractor could net at least twice that amount, and many made greatly in excess of that amount, as shown by Exhibits J and K. (R., 275, 276.) See the column "gross earnings", which in several instances, have run more than $1700.00 per month. Such "contractors" can take care of their own social security and they object to being classed as "employees". (R., 127.)

(c) Answer To Summary of Argument.

(1) Greyvan's contractors are not in the class of merely "earning their living"; they make a profit far superior to a wage in employment, as previously illustrated. They are not any more "subject to the hazards of unemployment" than other persons admitted to be independent contractors. For example: lawyers and doctors. Certainly a lawyer's business is dependent upon the continuance of the business of his clients; and his continuity of service is dependent upon the will of his client, yet the appellant does not contend that a lawyer is in employment. Many lawyers and doctors are economically dependent upon a sole client, which client furnishes their only source of income.

(2) Tort cases furnish no accurate rule for the interpretation of statutes (**United States v. Mutual Trucking Co.**, 141 F. 2d, 655). Such is the character of the **Rahn case**, 132 U. S., 519. All facts in this case illustrate the impossibility of Greyvan supervising the "means and manner" of performing the service which it engages the truckmen to do; necessarily no rules can control a truckman in "the details" of this work; and it is most impracticable and in fact impossible to send a company representative with a truck driver into the remote part of the territory in which it operates. An employed driver of a truck loading goods in Corpus Christi, Texas, is certainly impossible of control as to details, and manner and method of performance of the work, from Chicago, Ill., and all the company can do, and all it does do, is to tell the truckmen when to pick up a load and where to take it

for the purposes of delivery. "Instructions" to the truckmen refer to the written directions to the truckmen (R., 146) as illustrated on Plaintiff's Exhibit B (R., 274), and performance pursuant to its directions constitutes a part of the truckman's obligation under the contract. It is not a control of the means and manner of performance of the "details" of the job. While the truckmen's ownership of the van would not, of itself, prevent him from being respondent's employee, on the other hand his ownership of the truck and his operation of the truck under the respondent's certificate does not make him an employee of the company. The Motor Carrier Act not only does not prohibit such operation by Greyvan, but on the contrary, distinctly permits it. Motor Carrier Act, U. S. C. A., Title 49, § 303. (R., 257.).

(3) We submit that the effort of the collector to construct a payroll, and to create a "wage", where none in fact existed, and where neither the truckmen or the persons engaged by him, were Greyvan's employees, constitute the action of the collector arbitrary.

The burden of establishing that fact was fully met by the stipulation. (R., 25-26.) The inaccuracy of the enforced returns appears upon the face of the stipulation.

ARGUMENT.

Findings of Fact Establish Independent Contract Relationship.

The court found (R., 226):

"24. The relationship of employer and employee did not exist between the plaintiff company and the truckmen or between the persons employed by the truckmen to assist them in either the transportation work or in loading or unloading. The truckman was engaged in a business of his own, carried on by means of the use and operation of his own equipment for a lump sum paid in accordance with a prearranged schedule, out of which the truckman paid those whom he hired to assist in his driving, loading and unloading. Any surplus remaining to the truckmen from the payments made to them by plaintiff was retained by the truckmen, and if there was any deficiency, the loss was theirs. There was no obligation on their part to account to plaintiff for all, or any part of such payments. The degree of control over the hiring, paying, managing and discharging of his employees clearly stamped the employer-employee relationship as existing only between the truckman and his employees. No control, by plaintiff, over the truckman or his employees in any way inconsistent with the contract provisions existed. Such directions as are shown to have been given the truckmen were centered about the requirements provided by law for safety to the public and the safe transportation and delivery of the goods entrusted to plaintiff's custody."

The evidence fully supported the findings of facts.

Greyvan did not hire any of the employees of the independent contractors. Such of the independent con-

tractors as were called to the stand, including the single one called by the government (R., 186, 187), testified that they **hired, paid** and **fired** each of the employees designated in the enforced returns. See the agreed statment of facts, paragraph 7. (R., 25.) Plaintiff hired none of them. (R., 138.)

The appellant's assignment of error that there is no evidence to support the findings of the District Court is without merit or support.

Conclusions of Law Supported by Reason and Authority.

The following authorities from the long list of decided cases (see Appendix B) establish two propositions:

First. The relationship of employer and employee does not exist under the facts proven; and

Second. Nothing save an employment relationship wherein "wages" are paid, is taxable.

The trial court found (R., 227):

> "(2) During the periods involved in the amended and supplemental returns, plaintiff was not the employer of the persons so named, either specifically or otherwise, in said amended and supplemental returns. The truckmen specifically named in the amended and supplemental returns were independent contractors, and plaintiff was a principal. The persons included in the amended and supplemental returns under the designation of 'dummy' were the employees of the respective independent contractors, and not employees of the plaintiff."

In **Griff Williams v. United States**, 126 Fed. 2d, 129, involving liability for assessments under the Social Security Act, where the District Court found "control" to exist in twenty-two separate respects, the Circuit Court

reversed and held the contractor not liable for the tax, saying:

> "We have already concluded * * * that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee. Without this right, there could be no effective control by an employer." (Op., p. 133.)

Again the court says in the Williams case:

> "The status of the parties was plainly fixed by the contracts, including the rules of the Federation, and **there is no room for argument** that the establishments **had any right of control.**" (Op., p. 132.)

The Supreme Court of Ohio in **Commercial Motor Freight, Inc., v. Ebright,** 143 O. S., 127, 54 N. E. 2d, 297, where the facts were similar to those of the case at bar, involving independent contractors operating owner-operated vehicles for a common carrier, following the **Williams** case, says:

> "In the case at bar there was no authority upon the part of the appellant to hire or discharge employees of the owner-operators. This test has been held to be decisive of the liability of the employer for assessments under the Federal Social Security Act. Williams v. United States, 126 F. 2d, 129; McCain, Comm. of Labor, v. Crossett Lumber Co., 206 Ark., 54, 174 S. W. 2d, 114."

The Supreme Court of Ohio in that case adopted the following syllabus as applicable in the construction of

the statute which was held to adopt the same definitions with respect to employment as does the Federal Act:

> "A motor truck operator who, under contract, furnishes his own motor truck, including its fueling and maintenance, to a freight distributing corporation to haul with such motor truck the trailers of such corporation from point to point as directed, and for which he is compensated, according to the service rendered, determined either by the mileage covered or by the tonnage hauled, is an independent contractor and, as such, is not within the coverage of the state Unemployment Compensation Act."

Said Judge Hand in **Texas Co. v. Higgins**, 118 F. 2d, 636 (C. C. A. 2, 1941):

> "A persuasive reason for this conclusion, at least in the case at bar, is that Congress could scarcely have meant a man doing a business like Thomas's to enjoy the benefit of unemployment allowances; and if he was not an 'employee' his four assistants were not; the servant of a servant may be the master's servant, but the servant of an 'independent contractor' is not. **United Gas Improvement Co. v. Larson**, 182 Fed. Rep., 620 (C. C. A. 3)." (Op., p. 638.)

Again, from the same case, Judge Hand said:

> "Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; **the act appears to take over the term as the common law knew it**, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business * * *." (Op., p. 638.)

Judge Chestnut of the Maryland District Court, in **Yellow Cab v. Magruder, Coll.**, 49 F. Supp., 605, in interpreting this statute said:

> "It is obvious from the statute and regulations that the tax is not payable unless (1) there is an employer and employee, and the relationship of employment between them; and (2) wages are paid by the employer to the employee." (Op., p. 606.)

The Circuit Court of Appeals, in affirming the last cited case, 141 Fed. 2d, 324, says:

> "It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied: (1) there must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee. In no uncertain terms, Judge Chestnut negatived the existence of both of these conditions precedent. To say, under the terms of Federal Rules of Civil Procedure, Rule 52(a) that Judge Chestnut's findings and conclusions are not 'clearly erroneous,' . . . we think, largely in the nature of an exaggerate euphemism." (Op., p. 325.)

Judge Barksdale of the District Court of Virginia decided a very similar case in **Burruss et al. v. Early, Coll.**, 44 F. Supp., 21 (1942), where certain persons, engaging their own employees, operated a saw mill for lumber dealers and wherein the government contended that both the saw mill operators and their employees were employees of the lumber company. The case presents a fair parallel to the operations of the plaintiff in this case, and there the court held as conclusions of law:

> "(2) That the persons named in defendant's assessments who operated sawmills sawing plaintiff's lumber were independent contractors, and that

neither they nor their employees were employees of plaintiffs.

(3) That those persons named in defendant's assessments who hauled lumber for plaintiffs, were independent contractors, and that neither they, nor their employees, were employees of plaintiffs." (Op., p. 29.)

In **Jones, Collector, v. Goodson et al., Receivers,** 121 F. 2d, 176, Bratton, C. J., says:

"The tax is confined to cases where that relationship (employment) exists. It does not extend to instances where persons performing services are independent contractors." (Op., p. 179.)

In **United States v. Aberdeen Aerie,** 148 F. 2d, 655, the Government endeavored to assess the social security tax against the Order of Eagles arising from the services of physicians engaged to treat members of the Order. It was claimed that they were employees and not in the class of independent contractors. The court held the Order was not taxable with respect to the services of physicians, saying "there can be no comparison between the control exercised or capable of being exercised in that case[5] and the case at bar."

The appellant also cites **Nevius, Inc., v. Rothensis,** 151 F. 2d, 189 (C. C. A. 3), affirming 58 Fed. Supp., 460. Plaintiff recovered the tax. In that case in 1941, the owner of a chain of drug stores negotiated contracts with his employees changing the basis of the arrange-

[5] The appellant relies and quotes at length from United States v. Vogue, Inc., 145 F. 2d, 609, where the court held the establishment properly taxable on amounts paid a seamstress making alterations in garments for, and in the store, using a sewing machine furnished by the store and observing the same hours as store employees, but paid by the piece.

ment to an independent contract and thereafter the former employees operated the individual stores under a contract to buy exclusively from him. Holding the payments not to be wages, and the services not employment, the court states that the chief result was to establish a "business in the licensee (where he) had a personal interest which was more nearly the interest of an owner than anything else. He could make or lose money in the business. The possibility of profits could be enhanced by efficiency, economy and skill." (58 F. Supp., p. 462.)

This reasoning is very similar to the results accomplished by Greyvan in the use of its independent contractors instead of employees engaged on a menial basis.

Many of the cases cited do not present a comparable basis of fact to the Greyvan case. The **Bartels** case, 157 F. 2d, 295, involved a wholly different contract and it is distinguished from the Williams case on the facts, it being pointed out in the opinion of that case that a wholly different contract than that involved in the Williams case was involved in the Bartels case, and that the leader of the orchestra refused to perform unless the proprietors of the ballrooms assumed the relationship of the employers of both the leader and the members of the orchestra. (Op., p. 301.)

We have no such operation as that involved in the **Vogue** case, 145 F. 2d, 609, where a seamstress furnishing nothing save her service, or as that in the **Grace** case, 148 Fed. 2d, 679, which involved colored coal hustlers engaged for the purpose of putting coal in basements for a coal dealer, and who was not paid for the job performed until he (1) finished the job assigned,

(2) secured the signature of a satisfied customer, (3) returned dutifully to appellant's office and (4) presented a signed card and drew his money for the job. We most seriously protest being enmeshed in the vortex of this line of cases.

We are not in that class of cases relating to barbers and beauty shop operators, who furnish nothing save simple tools and work directly under the surveillance of the proprietor of the shop (**McDermott v. State**, 196 Wash., 261; 82 Pac. 2d, 568 (1938)), nor are we in the position of formulating a subterfuge for the sole purpose of avoiding payment of the tax to those in fact in employment. (R., 222.) Our contracts antedated the effective date of the act by at least five years.

In **Czark Minerals Co. v. Murphy, Director**, 384 Ill., 94, 51 N. E. 2d, 197 (1943), there was involved a contract for mining silica on property furnished by the Ozark Minerals Company, the persons with respect to whom the tax was assessed having agreed to furnish an ample supply of crude silica as requested by the company from time to time to meet its operations. The trial court held that such persons were not employees and dismissed the petition for recovery of assessments. The Illinois statute covered "employment * * * performed for wages or under any contract of hire * * *."

The Illinois Supreme Court sustains our position, saying:

> "That the General Assembly intended to tax only employing units upon the wages of employees and not independent or subcontractors, is clearly shown * * * to constitute 'employment' it was required that there be services performed for wages or under a contract of hire. Here, there were no wages, nor

"was there a contract of hire. * * * The contract did not provide for compensation for labor but for a tunnel or for a ton or tons of silica mined and ready for loading. It cannot be said that the owner of a lot who engages an independent contractor to dig a cistern of named dimensions and to pay, for such cistern, a stated sum per cubic yard for the excavation, when finished, is paying wages, any more than it could be said that if A contract with B and C to build a barn on his farm he is paying them wages for such construction. In such case, what A is paying for is a barn and not wages." (Op., p. 201.)

See also the same holding in **Gabel Mfg. Co. v. Murphy**, 390 Ill., 455, 62 N. E. 2d, 401. (1945).

Another is **Crossett Lumber Co. v. McCain, Commissioner of Labor**, 205 Ark. 631, 170 S. W. 2d, 64 wherein the lumber company was a large producer of lumber, owning and operating large plants, and had about 1,650 employees on its own payroll for whom it paid social security tax. About 1934 it contracted out a large portion of its logging operations and entered into contracts with persons who "furnished their own equipment, who hired and fired their own employees, and who were paid according to the owners' current published rate schedule in effect at the date of delivery," at so much per thousand feet. In 1941 Linder, a timber cutter, filed a claim for compensation under the act, claiming to be an employee of the lumber company. A large number of similar claims were filed by both the contractors and the employees of the contractors. In reversing the lower courts, the Supreme Court of Arkansas said:

"It appears to us that the evidence is wholly undisputed that the contractors were in fact and in

law independent; that they hired and discharged their own employees; that they paid them; that either the contractors or the men furnished their own equipment, tools, trucks, saws, axes; that the men were paid by the contractors on a 'piece' basis; that while appellant has a record of the amount paid to the contractors, based upon its current published schedule, it has no record of the amount paid by the contractors to the men nor did it know the men so employed; and that there was no control exercised by appellant over the contractors or the cutter, except as to the result to be accomplished. The fact that the written contract between appellant and its contractors reserves the right of either to terminate the contract on three days notice is not determinative of the question." (Op., p. 68.)

The Mississippi Supreme Court in **Texas Co. v. Wheeless**, 185 Miss., 799, 187 So., 880:

"In other words, they are capitalists, investors and employers, instead of men whose services are to be be had for hire." (Op., p. 887.)

We deem it unnecessary to further extend quotations from authorities sustaining appellee's position. Citations to many of the cases appear in Appendix B.[5]

[5] We submit that the contractors in this case were "independent entrepreneurs" as much as the owners of the vessels involved in *Columbia River Packers Assoc. vs Hinton*, 315 U. S. 143, 145; 86 L. Ed. 750, 752.

Contract is Determinative of the Intention of the Parties.

The contract plainly provides for an independent contractor relationship. It was of the same character involved in **Texas Co. v. Brice**, 26 F. 2d, 164. (C. C. A. 6), certiorari denied 278 U. S., 640, where "H" agreed to distribute the company's products by motor trucks owned by him and to be responsible for all the acts of the agents, employees and servants. The court there said:

> "Lacking such express provision (making servants of the agent his servants) it may often be proper to infer as some of these cited cases do, that there is privity between the principal and sub-agent; not so when 'the status of each party is fixed by the unmistakable word' (citing cases)." (Op., p. 167.)

This case was followed by **Howard W. Luff Co. v, Capece**, 61 F. 2d, 635 and **Craige v. Austin Powder Co.**, 91 F. 2d, 664, (C. C. A. 4).

The same rule was followed in **Ellis v. Associate Industries Insurance Corp.**, 24 F. 2d, 809, (C. C. A. 5), affirming 16 F. Supp. 2d, 464, which involved a claim under the Texas Workmen's Compensation Act. "W" was obliged to hire his own help which the contract provided were under his direction and control. An employee of "W" received injuries resulting in his death. The question presented was whether, under the circumstances, Ellis was an employee of "W" or American Refining Company. The court said:

> "On the facts in this case, considering the terms of the contract between Warren and the refining company and that the latter did not pay his wages, had nothing to say regarding his employment or discharge, and did not have control or direction of him

> in any way, we conclude that Ellis was not an employee of the refining company and appellee was not liable to appellants for compensation." (Op., p. 810).

As held in **Glenn v. Standard Oil Co.**, 148 F. 2d, 51, (6 C. C. A., 1945):

> "That the relationship as to whether it be an employer-employee, or independent contractor relationship, 'is to be determined by rights and obligations assumed as disclosed in terms of written contracts between the parties, as well as any actual practice of parties dealing with each other'."

Our evidence conclusively showed that Greyvan had at all times treated the truckman as an independent contractor and not as an employee. The District Court found that the provisions of the contract were adhered to by the parties. (R., p. 226.)

For the same holdings, see:

Industrial Commission v. McAdow, 126 O. S., 198, 184 N. E. 759;
Williams v. United States, 126 F. 2d, 129;
Sater v. Cities Service Oil Co., 291 N. W., 355;
Magnolia Petroleum Co. v. Gryich, 206 Ark., 352, 176 S. W. 2d, 435 (1943).

History of the Act Dispels Any Construction That Plaintiff Is Taxable With Respect to Any Part of the Payments Made to Its Independent Contractors; or With Respect to the Wages Paid by the Independent Contractors to Their Helpers Whom They Hired, Paid and Fired.

Counsel for the appellant argue and insist that the independent contractors and the helpers whom they engaged for a limited period of time for the purpose of assisting in loading and unloading the household goods, are within the class of persons intended to be included in the Social Security Act. The assertion gets counsel for the appellant no place unless they can show that Congress did, in fact, include them within the confines

of the act. However, counsel are in error in that contention as displayed by the history of the acts to which we now turn.

The Federal Social Security Act, which became effective August 14, 1935, was passed to achieve a program of social security by cooperation between the federal Congress and the several state Legislatures. The committee on economic security appointed by the President to make recommendations, made report on January 15, 1935, in which it recommended encouragement of "stabilization of employment" by the states and outlining a program which "will permit social and industrial stability." (See Report to the President dated January 15, 1935.)

As this court later said:

> "That act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency (unemployment) problem; and it found a method by which the state and the federal government could 'work together to a common end.'"

See:

Steward Machine Co. v. Davis, 301 U. S., 548, 81 L. Ed., 1291;

Buckstaff Bathhouse Co. v. McKinley, 308 U. S., 358, 84 L. Ed., 322.

In the last cited case the court says:

> "* * * Under the coordinated field which the act visualizes, when Congress brought within its scope various classes of **employers**, it in practical effect invited the states to tax **the same classes**. * * *" (84 L. Ed., 326.)

With this purpose in mind, it cannot be denied that the act was, of necessity, applicable only to employers having the power to hire and discharge their own employees, to determine their hours of labor, their conditions of work. Such employers could undertake adequate steps to stabilize employment. In this case, the independent contractors alone have those powers over the men whom they hired, controlled, paid and fired. Therefore, the independent contractors must be treated as the employers of their assistants, if the purpose of the act, "stabilization of employment," is to be effectuated.

Said Bratton, C. J., in **Jones v. Goodson**, 121 F. 2d, 176:

> "The tax imposed upon an employer is denominated an excise tax, and it has been judicially determined and sustained as such a tax levied upon the privilege of establishing and maintaining the relationship of employer and employee. Steward Machine Co. v. Davis, 301 U. S., 548; Helvering v. Davis, 301 U. S., 548. **The tax is confined to cases where that relationship exists. It does not extend to instances where persons performing services are independent contractors.**" (Op., p. 179.)

As said in **Texas Co. v. Wheeless**, 185 Miss. 799, 187 So., 880, in quoting from a prior case and citing **Steward Machine Co. v. Davis**, supra:

> "It is well known that many persons employed have not the prudence and ability and foresight to provide in advance, if left to their own initiative, for need in times of stress and unemployment. They are usually employed at a wage that barely meets the needs of current living expenses; they have but little power to control what compensation they shall receive for their labor; and usually have not the means to withstand unemployment for any consider-

able length of time without suffering for the necessities of life. (Op., p. 887.)

"Such was the meaning of the term 'employee' under a contract of hire at common law, and this definition has been followed in the judicial prudence contained in the decided cases. It is presumed to have been employed in this sense in the present statute." (Op., p. 888.)

Assuming the purposes of the Social Security Acts to be correctly stated in the foregoing, Greyvan's truckmen did not come within that classification. Greyvan could not make truckmen out of mere menial servants. They were required to be business men—a high grade man—a self-starter — resourceful and diplomatic — also a man who doesn't hesitate to get his hands dirty, a man competent to measure values—to know where he is going in a business way—as well as a man capable of understanding the rules and regulations of the ICC and also competent to load and unload the equipment in an efficient manner and to operate the equipment. (R., 163.) Also a man whose appearance was presentable, as "you can't deliver Mrs. Astor's furniture in overalls". (R., 113.) The District Court himself developed the "economic facts of the relationship between the parties" (Appellant's Brief p. 24) in the testimony of Mr. Schertzberg when he brought out (R., 176, 178) the fact that these truckmen did not come within the definition referred to above but instead were businessmen of their own, using their own investment running up to $5,000.00, (R., 116) making an income far superior to that of an ordinary menial servant, (R., 102) out of which they had ample funds to take care of their own social security instead of relying upon an arm of the government to do it for them.

Congress, in 1939, had before it for consideration a change of the basis of taxation, consideration of a bill to extend the application of the acts to certain other relationships other than employer-employee. The attempt was debated in Congress during the summer of 1939 and an amendment was adopted in the House which included:

> "* * * any individual, who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant) unless * * *" (See Report of Rep. Doughton of Committee on Ways and Means, dated June 2, 1939, to accompany H. R. 6635, pp. 109-10.)

In the Senate, the finance committee struck out the proposed amendment, saying:

> "Definitions of employee and employer — The House proposal to extend coverage to salesmen who are not employees has been stricken out by the committee. It is believed inexpedient to change the existing law **which limits coverage to employees.** * * *" (Report of Senator King for the committee dated July 7, 1939, to accompany H. R. 6635, p. 75.)

The conference committee sustained the Senate saying:

> "Amendments Nos. 97 and 98—The House bill extended coverage to certain salesmen **who are not employees** * * *. It is believed inexpedient to change the existing law **which limits coverage to employees.** The House recedes." (Conference Report of Rep. Doughton, dated August 4, 1939, to accompany H. R. 6635, p. 14.)

As said in the opinion of Mr. Justice Cardozo, in **Norwegian Nitrogen Products Co. v. United States,** 288 U. S., 294, 77 L. Ed., 796:

> "The history of the statute as it passed through the two houses of the Congress supplies confirmatory evidence." (Op., 77 L. Ed., p. 802.)

The history immediately referred to supplies confirmatory evidence that the employer-employee relationship, as known at the common law, was to be taxed with regard to **employment** on a **percentage** of the **wage** paid. Since no **wage** was paid in the case, the case ends with the determination of that fact. (See Findings of Facts, ¶25, R., 227, Exhibits D, F and G, R., 274.)

ASSESSMENTS WERE ARBITRARILY MADE.

Greyvan's agreement with the truckmen was indivisible. That agreement was to pay a stated amount for the completed transportation which the contract truckman undertook to consummate. **Commercial Motor Freight, Inc., v. Ebright,** 143 O. S., 127, 54 N. E. 2d, 297, 151 A. L. R., 1321. Amounts to which the truckman, as an independent contractor, was entitled on each particular haul were determined in advance from the schedule attached to the contract. There was no amount specified for wages and no amount specified for the use of the equipment, expenses, investment, maintenance or **profit.** The collecter could not divide anything which the parties themselves did not attempt to divide and which cannot, in the nature of the thing, be divided. He could not renegotiate the contract between the truckmen and Grey-

van, nor could he substitute one of his own making in place thereof.

No wages were paid to the truckman; nor were any one of the employees or the contract truckmen on the payroll of Greyvan. The contract truckman was the paymaster of the persons whom he hired, controlled while in his employ, and fired at the conclusion of the employment, or sooner, if he desired.

How the collector can justify an attempt to break down this contract and segregate a "wage" on which to apply the percentage of tax specified in the statute, we cannot comprehend. Such action was arbitrary, unjustified and unlawful.

The stipulation (R., 25, par. 8) shows the method and the manner of arriving at the computations made by the collector. He forced a "payroll" for Greyvan in the manner therein stipulated. Exhibit G (R., 45-62) shows the manner in which it was done. Under the column "Name of Employee" on each page of this exhibit (except the final sheet), the contract truckman's name was written therein. The three months period for which the assessment is made is indicated in the proper column. Under the column "Amount of Wages Actually Reported on Return" is found the word "none." Under the column "Correct Amount of Wages" is inserted the amount arrived at by the artificial means of producing a pay roll. Attention is called particularly to the first column "Employees Account No." The word "unknown" appears throughout the whole series of the enforced supplemental returns.

Attention is called to the last sheet of Exhibit G (R., 62), where, under the column "Name of Employer" there

is extended the word "Dummy." These covered helpers who were employed and paid by the various truckmen themselves, and whose estimated wages were arbitrarily arrived at in the manner set forth in paragraphs 8(b) (R., 26) of the stipulation. The names of such persons were entirely unknown to Greyvan. They had no records from which the identity of such persons could be ascertained. (R., 62, 137.) No consideration was given to such portion of that labor as was furnished by warehouses throughout the country and upon whose wages, it must be presumed, social security taxes were paid by the owners of such warehouses and the employers of such labor, as required by the law (R., 167.)

That the action of the collector was not only arbitrary, but inconsistent, is also demonstrated by the fact that certain of the truckmen were employers, had employers' numbers, and paid the social security taxes with respect to their own employees.

The Supreme Court of Ohio in **Commercial Motor Freight, Inc. v. Ebright**, 143 O. S., 127, 54 N. E., 2d, 297, (1944), said with respect to a similar method of determination of a tax:

> "It must be conceded that the assessment of premiums, under the Unemployment Compensation Act, is made upon 'wages' resulting from employment. It seems untenable, in the absence of legislation for that purpose, to claim that any part of compensation paid for transportation involving the use of a truck and the service of its operator can be segregated and designated as 'wages'. The General Assembly has not seen proper to make any provision for this very important determination, if permissible. On the other hand, the problem must be one of such frequent occurrence that it can scarcely be said to have

escaped the attention of the statute makers if they had intended to recognize such a computation of wages in such cases. This court should not be called upon to supply any such omission, on the part of the General Assembly, if it was an omission. **Yellow Cab Co. of D. C., Inc. v. Magruder, Coll.**, 49 F. Supp., 605; **Lake Shore Electric Railway Co. v. Public Utilities Commission**, 115 Ohio St., 311, 154 N. E., 239."

In **Iselin v. United States**, 270 U. S., 245, 70 Law Ed., 566, the court held:

"Courts cannot supply omissions in internal revenue laws."

In the opinion of Mr. Justice Brandeis, the court says:

"What the government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function of deciding cases." (Op., p. 251.)

The omission in the present act was not an inadvertence, but was the considerate judgment of the Congress.

Counsel for the appellant's claim that Treasurer Shearer agreed to the "allocation." Without questioning whether such an agreement would be beyond his authority, or supported by a consideration, no such agreement was made. Such an agreement was expressly denied by Shearer (R., 141) and the appellant put on no witness to prove the contrary. The effect of the testimony was, that if the plaintiff was liable for the tax, the amount was not controverted. The court sustained our objection to the question as to whether there was "controversy about the amount of wages." (R., 141.) Further-

more, we introduced no evidence as to the correctness or incorrectness of the computations but content ourselves on the proposition that there was no wage paid, and there is no tax payable because the truckmen were not employees within the meaning of the Social Security Act. Why the appellant insists upon it we cannot understand, because, if there is a liability for the tax such liability exists irrespective of any agreement with Treasurer Shearer.

REGULATIONS OF TREASURY DEPARTMENT.

Regulations of the Treasury Department are printed by the appellant in Appendix, p. 53 et seq. They have no application whatsoever to the case presented by the record.

Judge Learned Hand in **Radio City Music Hall Corp. v. United States**, 135 F. 2d, 715 (1943), said:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor'; it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn, 132 U. S. 518, 523. We assumed its conclusiveness in Texas Company v. Higgins, supra, (118 Fed. (2), 636, 638), and so have the Tenth Circuit (Jones v. Goodson, 121 Fed. (2) 176, 179), and the Seventh (Williams v. United States, 126 Fed. (2), 129, 132)." (Op., p. 717.)

In **Yellow Cab Co. v. Magruder, Collector**, 49 F. Supp., 605 where lessees of taxicabs were attempted to be taxed, the court, Judge Chestnut, said:

> "Where the alleged taxpayer has no right to demand an accounting from the alleged employee, it

would seem impossible for him to compute and pay the tax. The facts in the instant case illustrate this very difficulty." (Op., p. 611.)

The Circuit Court of Appeals in affirming the judgment, 141 F. 2d, 324, of the District Court granting recovery of the tax say:

"Judge Chestnut also aptly pointed out the difficulties, which are many and obvious, in administering this tax statute if it be held to cover the activities of Yellow Cab and its drivers." (Op., p. 326.)

As shown by the record (R., 218), following the decision of the case of **Mutual Trucking Co. v. U. S.**, 141 F. 2d, 655, on April 17, 1944, the Commissioner of Internal Revenue, by mimeograph dated July 22, 1944, reversed his previous decisions under which this line of cases had arisen and accepted the holding in **Mutual Trucking Co. v. U. S.**, as dispositive of these questions.

Contemporaneous construction of the treasury department's regulations by those charged the enforcement of such regulations is entitled to respectful consideration and will not be overruled except for weighty reasons. **Fawcus Machine Co. v. United States**, 282 U. S., 375, 75 L. Ed., 397. And this should be particularly true where the collector failed to act until after March 31, 1942, whereas the acts became effective January 1, 1936 and 1937.

In order to support the theory that cases in the "borderland" should be controlled by "economic factors", appellant endeavors to twist out of the plain language of the regulations a requirement of economic independence.

The regulations neither state nor infer any such test. The explanation of the control test in the regulations follows immediately after the statement that:

> "Whether the relationship of employer and employee exists will, in doubtful cases, be determined upon an examination of the particular facts of each case."

which clearly indicates that such test is intended to apply in such cases. It is common knowledge that the common law test has been used in administering the law from the beginning. The present attempt to induce this court to adopt an economic test is merely an attempt to broaden the coverage of the act through judicial legislation. In relying upon the quotation from the ruling of the appeals counsel in **Matter of William Edward Stanley**, Case No. 12-338, (Silk Brief p. 39,) the appellant is merely trying to pull itself up by its own boot straps, since the ruling merely expresses the argument which appellant was making in the lower courts at the time the ruling was written in the cases now before the court.

The argument (Silk Brief, p. 41) that the courts should construe the law in accordance with the desires of the Social Security Board falls of its own weight, unless congress has plainly granted the power.

THE ISSUE OF CONTROL.

The appellant here, as in the courts below, has failed to draw a proper line of demarcation between cooperation and control.

Further, the factual question is resolved against the appellant by paragraph 24 of the findings of fact. (R., p. 226.)

Neither the common law rule as applied in tort cases or elsewhere has application. The statute furnishes the sole test with reference to who is or who is not taxable. It does not depend upon whether one exercises control; therefore, the Circuit Court of Appeals and the District Court were correct in holding that the evidence as a whole conclusively showed the existence of the independent contract relationship and the payment of no wage, which took the case without the statute.

Control v. Independent Contracts.

"Independent contractor" and "servant" are defined in the **Restatement of the Law of Agency**, page 11, section 2, as follows:

> "(2) A servant is a person employed by a master to perform service in his affairs whose **physical conduct** in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his **physical conduct** in the performance of the undertaking."

The subject "right of control" is discussed in **27 Amer. Jur.**, Section 7, p. 488, as follows:

> "The control of the work reserved in the employer which effects a master-servant relationship is control of the means and manner of performance of the work as well as of the result; an independent contractor relationship exists where the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment."

In **Texas Co. v. Higgins**, 32 F. Supp., 428, determining there was no liability for assessments under the federal act, it was said:

> "It has been held that even a considerable degree of control does not of itself change the status of an independent contractor into that of a servant." (Op., p. 430.)

It is well recognized that a measure of control does not affect the independent contractor relationship when such supervision is inherent in any joint undertaking.

Radio City Music Hall Corp. v. United States, 135 F. 2d, 715, 718;

Los Angeles Athletic Club v. United States, 54 F. Supp., 702, 706;

Schatz Pollock Woolen Co. v. Murphy, Director, 348 Ill., 218, 51 N. E. 2d, 147, 148.

As said in the **Los Angeles Club case**, supra, in holding that there was no employment:

> "What appears here to be control can be more aptly described as requests that certain things be done, and the mere fact that the requests made have been complied with does not prove the right of control in the establishments of plaintiff. **Williams v. United States, supra.** Viewing the evidence in its entirety it is clear that any direction exercised by the plaintiff falls short of the right of control necessary to constitute plaintiff the employer of the orchestra members." (Op., p. 706.)

Compare **Metcalf & Eddy v. Mitchell**, 269 U. S., 514, 521;

Underwood v. Commissioner, 56 F. 2d, 67, 71; **Schroepfer v. Abell Co.**, 48 F. Supp. 88, 96; aff. 138 F. 2d, 111; cert. denied, 321 U. S., 763.

The definitions of who are subject to the National Labor Relations Act and the Fair Labor Standards Act are not to be found within the Social Security Acts or any of the acts quoted or referred to in the cases cited in Appendix B. Consequently such cases as **Walling v. Rutherford Food Corp.**, 156 F. 2d, 513, **National Labor Relations Board v. Hearst Publications**, 322 U. S., 111, have no application here.

The Manual for Truckmen.

The main hold of the appellant is on the "Manual for Truckmen" introduced in evidence as the Government's Exhibit 1. (R., 276.) The argument is entirely beside the point since there was no employment, no wages, and consequently could be no tax. (**Williams v. U. S.**, 126 Fed. 2d, 129.)

The District Court disregarded the exhibit because the evidence showed that the manual, while prepared and distributed, was never enforced or relied upon, and was used only for the information which it contained to a new truckman starting in the business or as a reference book. (R., 104, 150, 154, 171 and 257.)

In the first instance, the period involved is from January 1937, through the first three months of 1942. The manual was not distributed until April 20, 1940, so that it can have no effect whatsoever upon that part of the assessment preceding April 20, 1940. (R., 140.)

Secondly, the independent contracts date back to 1929, long prior to the enactment of the social security legislation. As established by the evidence, operators of this equipment traveled far and were away from Chi-

cago and the offices of the company and under no supervision whatever for weeks and even months at a time. It was impossible for the company to supervise the **details of their operations**, which character of supervision goes hand in hand with an employer-employee relationship. Growing out of early lessons, the company found it advisable to obtain the services of a business man (not a mere menial servant) who had sufficient business capacity to properly handle the customers of Greyvan, (R., 163) who by means of a large investment and solicitation of business throughout the 38 states served, it had been able to procure. (R., 119, 162, 163.) A large majority of its customers were householders, mainly women, (R., 113) who had pride of ownership in the household goods to be moved and many of whom were extremely hard to please. The business is different from a general trucking business where commercial establishments call when there is property to be transported; the business is scattered as people seldom move from city to city. (R., 136.)

On company operated equipment, employees occasionally failed to keep the vans moving, were reckless in handling the company equipment, unnecessarily damaged the shippers' goods, adding expense, for which and other reasons it was decided imperative to secure persons who owned and operated their own equipment, even though it became necessary to divide with them a larger share of the profits than would have been necessary under an employment relationship. (R., 102, 176, 177, Exhibit J and K, R., 275, 276.) The truckman was an employer and in business for himself. (R., 127.)

Thus the independent contract relationship came into existence and would have been used 100 per cent during the time involved if conditions had permitted. (R., 177.)*

With this history in mind what became of the manual? The three former employees who prepared the manual overlooked the impossibility of enforcing the provisions of the manual. Being impossible of enforcement, the company as to the owner-operators never endeavored to enforce it. (R., 171.) The truckmen and dispatcher paid no attention to the manual (Bossert, R., 104; Prante, R., 150, 151.) Provisions with reference to uniforms were not enforced. (R., 103, 113, 171, 179.)

A single former truckman, one Joe Garrison, out of the 50 to 60 truckmen involved, was produced. He had been a failure and voluntarily quit. His understanding with reference to the manual were assumptions of his own, not any instructions that he received from any of the officials of the company, and the assumptions were stricken. (R., 185, 186.) He remembered no conversation with any company official in connection with the manual. (R., 186.)

Even the witness, Garrison, supported the company in most of his testimony. Five truckmen were considered to have testified cumulatively in support of the testimony of Mr. Bossert (R., 141), and there was no evidence of probative value to contradict the testimony submitted by the plaintiff that the manual was impractical and never was enforced. In fact, dispatcher Prante testified that he never saw the book, let alone use it. (R., 150, 151.)

* It is now being used exclusively.

The manual was not adhered to and not enforced; it was used solely for the purpose of the information which it contained; not as a directive. (See particularly, distances, R., 329; and location of parking lots, agencies and branch offices, R., 339-368.). For the reasons heretofore stated, it was useless as a directive to the truckmen.

The following cases hold such directives do not affect the independent contractor relationship.

Griff Williams v. United States, 126 Fed. 2d, 129;
Radio City Music Hall Corp. v. United States, 135 Fed. 2d, 715;
Standard Oil Co. v. Glenn, 52 F. Supp., 755, aff'd 148 F. 2d, 51;
United States v. Davis, 154 F. 2d, 314 (U. S. Ct. of App., D. C., 1946).

The manual has no place in this case. It cannot establish the basis of taxation necessary in this case. The basis of taxation is wholly lacking in this case, control or no control. To set aside the company's contracts with its truckmen and to renegotiate such contracts, in order to establish a wage basis upon which the percentages mentioned in the statute can be applied, is legislating. This is what the collector did. Certainly the court will

At appellant's brief, (page 14) is given an excellent example of the "Williams" concept of the manual. It was constructed by three visionary part time employees (R., 171). Dispatcher Prante, who had immediate contact with every truckman, never discussed the manual with them. "I never referred to it, never had occasion to refer to it". (R., 151).

In reply to appellant's brief (page 38), the manual does show detail which the truckmen already knew and which they were able to perform without instructions from a written text book and, as the witness put it, "carried the manual with him, but "half the time, he didn't know where it was" and "used it as a reference book more than anything else". (R., 194). Ten men would so testify. (R., 120). Most of the truckmen had experience and were trained before entering Greyhound's service. (R., 194). The location of parking lots was furnished by means of circulars issued from time to time. Company officials had never seen some of the lots (R., 8).

not sustain such attempt at legislating. It is his job to enforce the statutes as they stand; not to rewrite them. That job can safely be left to Congress, whose members are elected by the people.

Whether this court can construe the manual irrespective of the District Court's judgment and findings is immaterial, since the District Court sustained us on the point that the manual was never effective or enforced; consequently further consideration of that point drops from the case.

This finding of the District Court was fully approved by the Circuit Court of Appeals. (R., 257.)

Parking Lots. Parking lots were generally gasoline stations located in various localities through which Greyvan did business. At these points the owner of the equipment might park his truck either temporarily, or for the night, and many there slept in the sleeper cabs which were provided in the tractors. That gave him opportunity to guard any load which might be on the truck at the time and for the safety of which he was responsible. At those points he might also get the necessary helpers for loading and unloading, as other trucking companies also used the same lots and such helpers would congregate at those points, or from which they might be located. No consideration was paid by the Greyvan or by the truckmen, except the patronage by the truckmen for gasoline, oil and supplies. There was no requirement that the truckmen use any particular lots, unless he found it advantageous to use them, a list of which he was supplied with. (R., 156, 159, 164, 167, and 169.)

Dispatcher. Witness Prante was the dispatcher who was on call at all hours of the day or night. It was his job to know what loads they had to move throughout the entire 38 states, and to know what equipment, whether company-owned or owner-operated, was available for moving those loads. The closest van got the load. Accordingly, co-operation was required by the drivers in notifying the dispatcher when they had delivered, or were about to deliver, a load so that the load to be moved in that vicinity might be assigned to them. (See R., 98, 130, 145, 146.) The arrangement was not stemming out of control of owner-operated equipment, but was a matter of co-operation whereby the most efficiency might be had out of the equipment and the truckman might be kept engaged all the time. That was what they were in the business for.

Regulations of the Interstate Commerce Commission. Many of the alleged requirements stem from the regulations of the Interstate Commerce Commission including the following:

Insurance. This regulation requires all motor equipment operating under one certificate to be insured in the same insurance carrier. This applies to the liability and property damage insurance and cargo. Cargo may be insured in a separate company since liability companies generally do not write, and are not authorized to write both kinds of insurance. Consequently, in order to carry out the contract, it was necessary for Greyvan to arrange for the liability and property damage insurance in one company and the cargo insurance in another. Under the contract that insurance was chargeable to the truckman and it was so handled by charging the

amount against his account on a monthly basis. No control can stem from that provision of the contract. Further, by so doing it was obtained on a more economical basis. (R., 168.)

Using Equipment for Other Purposes. Also stemming from the regulations of the I. C. C. is the contract provision requiring operation solely in the company's business. This provision prohibits the transportation of any goods except in the business of the carrier whose certificate numbers are displayed on the vehicle. There was no prohibition upon the use of the equipment for other purposes in the event the certificate numbers were removed while so doing. However, there was sufficient business available to keep these tracks engaged at all times. It shows no control or employment.

Likewise a physical examination of the driver is required by the rules of the I. C. C. The trackman was permitted to select his own doctor. (R., 170.) Also, prohibition of the use of alcoholic beverages and prohibition of transporting others than those entitled to be on the truck stem from those regulations.

Markings on Equipment. The point is made (Br., p. 12) that the equipment bore the appellee's name.

The safety regulations of the I. C. C. required the markings on the vehicle. The point might be germane in a tort action but not in this case where rights stem solely from the contract between the parties.

In the following cases where the relationship of independent contractor existed, but the name of the company for whom the operation was being made appeared on

the trucks, the court held that such circumstance "was not of controlling importance."

Texas Co. v. Brice, 26 F. 2d, 164, 165;
Brownligg v. Allvine Dairy Co., 137 Kas., 209, 19 Pac. 2d, 474, (1933);
Riggs v. Haden Co., 127 Tex., 314, 94 S. W. 2d, 152, 154 (Texas, 1936);
Lewis v. Transfer Co., 119 S. W. 2d, 106 (Texas, 1938);
Coviello v. Industrial Commission, 129 O. S., 589, 196 N. E., 661;
State, ex rel. v. Commercial Motor Freight, Inc., 48 N. E. 2d, 898;
Magnolia Pet Co v. Griych, 206 Ark. 352, 176 S. W. 2d, 435;
Halkias v. Wilkoff Co., 144 O. S., 139, 145, 47 N. E. 2d, 199.

Contract Terminable on Notice. The fact that the contract was terminable on notice by either party did not convert the independent contract into a contract of employment for hire.

Texas Co. v. Higgins, 118 F. 2d, 636, 638;
American Oil Co. v. Fly, 135 F. 2d, 491, 493;
Crossett Lumber Co. v. McCain, 205 Ark. 631, 170 S. W., 64, 68.

Furthermore, in answer to appellant's brief, p. 33, the contract could not be terminated while under load. It was a continuing contract, but either party might cancel before a particular transportation had been entered into, the contract expressly providing that truckman should complete delivery; (R., 271) and, after the transportation had begun the company would be under legal liability to compensate the truckman for the service. Under the contract the carriage of each load was a separate

transaction and either the truckman, or appellee, might maintain an action for breach of the contract with respect thereto. See **Fisher Body Co. v. Wade**, 45 Ohio Appeals, 263, 187 N. E., 78.

Exclusive Use of Equipment.

Appellant urges (Br., p. 30) that the truckman is an employee since he must devote his van exclusively to the services of the company in the transportation of goods entrusted to it by shippers. The contention is answered in **Fidelity & Casualty Co. v. Industrial Comm.**, 191 Cal. 404, 216 Pac., 578, (1923), wherein the court said:

> "Respondents * * * argue that the decedent was not pursuing an independent occupation because he was not doing hauling for anyone else, and was not permitted so to do under the provisions of his contract for the term thereof. This is a non sequitur. The question whether or not one is pursuing an independent occupation does not depend upon whether he is serving one person or many persons, but whether in the pursuit of his occupation he is acting on his own behalf or as the servant of another. * * *
>
> "A single large railroad company, for example, might find work enough for a contractor to occupy his whole lifetime, yet leave him to work in perfect independence, accepting the results of his labor without ever interfering with his choice of the mode and the instruments of working. * * *" (Op., p. 581).

A decision by this court, along the same lines, is **Robinson v. B. & O. Rd. Co.**, 237 U. S., 84, an action brought under the Federal Employers Liability Act, where the plaintiff was held to be an independent contractor and the court in so holding said:

"The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employe's of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the latter was commensurate with its duty and existed only that it might perform its paramount obligation. (Op., p. 93).

In **Chicago, Rock Island & Pacific Ry Co., v. Bond,** 240 U. S., 449, 60 L. Ed., 735, this court determined that one who had contracted to keep a sufficient supply of coal in readiness for use by a railway company and providing the necessary labor therefor being paid on a tonnage basis, was an independent contractor and no recovery for his death could be had under the Federal Employers Liability Act. In reversing the judgment of the trial court, this court said:

"We are unable to concur with the learned court in its conclusion. There was, it's true, and necessarily, a certain direction to be given by the company, or rather, we should say, **information given to Turner.** But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for daily supply of coal for the operation of the railroad. **The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees.** It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee

and a remedy against his incompetency or neglect." (Op., p. 456.)

See also, **Crossett Lumber Co. v. McCain**, 205 Ark. 631, 170 S. W. (2), 64, and **Norton v. Day Coal Co.**, 192 Iowa 160, 180 N. W., 905, a compensation case involving the hauling of coal with a truck paid on a load basis.

The situation is much the same as that of a purchaser of goods who buys all of his products from one concern. He may stop buying at any time he so desires. That was the state of facts presented in **Nevius, Inc. v. Rothensis**, 151 F. 2d, 189.

Compliance With Regulations of I. C. C.

Counsel refer to the provision of the contract which provides that the service performed shall be "in accordance with the tariffs, rules and regulations of the company."

Those are requirements imposed by the rules and regulations of the I.C.C. (R., 166). In order for the truckman to accomplish his contract for the transportation of the goods, the truckman must comply with the same rules and regulations, and the same tariff provisions that are imposed and obligatory upon the common carrier. That is part of the contract obligation which the truckman assumed upon signing it. It is the **"what"** provided for in the contract, and is no part of the **"how"** to do the work. Without such compliance the contract would be of no benefit whatsoever to the appellee.

In **Glenn v. Standard Oil Co.**, 148 F. 2d, 51, where such a provision of the contract was involved, the court said:

"With reference to the provision in which the agent agreed to follow all instructions given him in

"regard to the general conduct of the business of the company it may be said that this is not indicative of control of the means and methods which the agent uses to sell the company's products."

In **United States v. Davis**, 154 Fed. 2d, 314, (U. S. Court of Appeals, District of Columbia, 1946), a similar contract provision was involved, findings of fact similar were made by the District Court, and judgment for the taxpayer was affirmed.

Compare **Lehr, Int. v. Brown**, 91 S. W., 693 (Texas 1936).

APPLICATION TO THE INTERSTATE COMMERCE COMMISSION.

Counsel make much ado about nothing over the application of Greyvan for operating rights under the grandfather clause of the Motor Vehicle Act. (R. 380-395). They claim we misrepresented our operations to the commission. (See R., 257). Their sole claim of misrepresentation arises from a single sentence (apparently garbled in transcription). (R., 387).

If counsel were able to point out a misrepresentation of fact, they might have some good ground for their position. No misrepresentation of facts is to be found in the entire record. The application was filed February 10, 1936, came on for hearing, and on April 5, 1939, Examiner Garafalo filed his report reciting the facts as disclosed in the evidence in that case and in this, and recommended disallowance of the application. That was before the decision in the **Dixie-Ohio Express Company** case, 17 M. C. C. 735 (in 1939) and before the decisions of this court hereinafter referred to and the examiners

of the Interstate Commerce Commission to which such matters were being referred, had no decided cases for guidance.

Upon application of Greyvan, a rehearing was granted and held October 25, 1939, the order of Examiner Garafalo was vacated and set aside and, on rehearing, the permit was granted on evidence of the same character as was submitted in this case, with respect to operations by means of independent contractors. (R., 389; reported 32 M. C. C. 719, where the evidence is reviewed and the granting of the application was ordered.) Answering the contention that Greyvan was not entitled to the permit under the grandfather clause because the equipment was operated by the truckmen, Commissioners Mahaffie, Rodgers and Alldredge by decision dated March 17, 1942, granted applicant its permit saying, with respect to owner-operated vehicles:

> "Although such vehicles were used in applicant's service exclusively, it does not follow that applicant owned and operated such equipment. Applicant, itself, does not so contend. Rather does the arrangement suggest a financial transaction having no immediate connection with the use of such equipment." (R., 393.)

Appellant's counsel quote from the order to the effect that the commission found that the equipment "was operated under the full management and control of the company." Turning to the Motor Carrier Act of Congress, Chap. 8, Title 49, U. S. Code, Sec. 303, originally defined "common carrier by motor vehicle" as "any person who or which undertakes, whether **directly** or by **lease** or **any other arrangement**, to transport passengers and property * * *." (R., 257.)

The Motor Carrier Act was amended September 18, 1940, added certain provisions but did not change either the purpose or intent of the act. Under the title "Definitions," Section 303(14) provided that the term "common carrier by motor vehicle" meant "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property, or any class or classes thereof for compensation, whether over regular or irregular routes * * *."

It was provided in Section 303(19):

> "The 'services' and 'transportation' to which this chapter applies include all vehicles operated **by, for, or in the interest of** any motor carrier **irrespective of ownership or of contract**, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce, or in the performance of any service in connection therewith."

As relating to the definition of "services" and "transportation" attention may be called to Section 308 of the act for a limitation on the powers of the commission in the following singular terms and provisions:

> "That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the route, between the terminal or within the territory specified in the certificate, as the developments of the business and the demands of the public shall require."

The Motor Carrier Act expressly recognizes that ownership of a vehicle, and the existence of an employer-employee relationship between the carrier and operator

of equipment is not essential and whether or not the operator of a vehicle is within the Social Security Act, depends upon the terms of the contract existing between him and his actual employer—the one who pays him his compensation for services performed under a contract of hire." **Williams v. United States**, 136 F. 2d, 129.

Citation of the **Dixie-Ohio case** (Br., p. 35) shows on its face that Government counsel have misinterpreted the **character of control** specified in the Motor Carrier Act.

In the **Dixie-Ohio** case, where owner-operators were used on the trucks engaged by the common carrier, the commission granted the certificate. It is the first and leading case on the subject. Commissioner Eastman, Federal Co-ordinator of Transportation when the act was drafted, and who is accredited with having formed the Motor Carrier Act (U. S. v. American Trucking Assoc., 310 U. S., 534, 538), said;

> "Applying the principles so indicated to the present case, the evidence shows that the traffic transported in the vehicles of the owner-operators moved on bills of lading issued by applicant, **which assumed full responsibility as a common carrier therefor.** The consignors of the shipments dealt only with applicant. * * * The conclusion follows, therefore, that as to its operations in which such vehicles were employed, applicant was a common carrier by motor vehicle as defined in Section 203(a)(14) of the act."

As shown by the foregoing quotations from the Motor Carrier Act there is no provision therein which attempts any regulation as to the character of relationship existing between the carriers and those who may be engaged to perform the transportation of goods entrusted to the

carrier. This court has held that the Interstate Commerce Commission has no authority to disregard the provisions of the act and impose restrictions of its own inconsistent with the act. **United States v. Carolina Freight Carriers Corp.**, 315 U. S., 475.

Also, this court in the following cases, has sustained the legality of operation under the owner-operator system.

In **United States v. Rosenbloom Truck Lines**, 315 U. S., 50, 86 L. Ed., 671 (1942), this court recognized the legality of the relation between the carrier and an independent contractor, and cites with approval the decisions of the Interstate Commerce Commission arising out of such contracts, with owner-drivers. In that case the court held that the Interstate Commerce Commission rightly denied owner-operator's permits under the grandfather clause of the Motor Carrier Act, since they, by drivers in their employ, had "hauled only for common carriers by motor vehicle * * * for which they were paid a lump sum on dock to dock movements." It appeared there that the owner-operator's equipment was secured on oral contracts to handle overflow freight, "solicited by the common carrier, accumulated at its terminal, loaded and unloaded by its employees, and moved from consignor to consignee on that carrier's way bills." (Op., p. 52.)

In **Thompson, etc., v. United States**, 321 U. S., 19 (reversing 34 M. M. C. (F.), 299), decided January 7, 1944, this court held the carrier entitled to the certificate, saying:

> "Thus the railroad clearly is undertaking to transport freight by an 'other arrangement' as those words are used in the original statutory definition of 'common carrier by motor vehicle.' Cf. Chairman

Eastman's concurring opinion in Re Missouri P. R. Co., 22 M.C.C. (F.), 321, 333. Even more clearly, under the amended definition, the railroad is holding itself out to the general public to engage in the transportation of freight by motor vehicle as part of its coordinated rail-motor freight service. In short, it is a common carrier by motor vehicle within the meaning of the act." (Op., p. 25.)

The point was also sustained by the Circuit Court of Appeals of the Sixth Circuit in **United States v. Mutual Trucking Company**, 141 F. 2d, 655, where that court said in the opinion of Allen, J.:

"The Interstate Commerce Commission recognizes operation of trucking companies through independent contract, and in its auditing department reports this class of business under the heading 'Purchased Transportation.' Since the Motor Carrier Act, now Part II of the Interstate Commerce Act, Title 49, U. S. C., Section 301 et seq., 49 U. S. C. A. Section 301 et seq., covers 'all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied,' Title 49, U. S. C., Section 303 (19), 49 U. S. C. A., Section 303 (19), the present operation, so far from being condemned, is valid under federal law." (Op., p. 658.)

The lower court in this case so held. (R., 257.)

The Interstate Commerce Commission recognizes the validity of operations on both the independent contractor basis and the lease system in granting certificates of convenience and necessity under the grandfather clause to various motor carriers.

The extent of the Motor Carrier Act and the regulations adopted thereunder by the Interstate Commerce

Commission are directed to the accomplishment of two objects:

First, the regulation of the relationship between the shipper and/or consignee, and the carrier, so that the carrier's contract liability to either the consignor or consignee may not be evaded. **Thompson v. United States,** 321 U. S., 19.

Second, the regulation of the carrier's relationship to the general public whereby the carrier's tort responsibility to the general public cannot be evaded, as instanced in **Hedges v. Johnson,** 52 F. Supp., 488.

Counsel for appellants cite the very recent decision in the **Allied Van Lines** case, 46 M. C. C., 159, in which the Interstate Commerce Commission in refusing the Allied Van Lines a permit under the grandfather clause, quote from the Greyvan decision, 32 M. C. C., 719. There, the sole issue was whether, on June 1, 1935, the applicant was in bona fide operation as a common carrier. In deciding that it was not, the commission acted on evidence showing that the National Association of Warehouse men had, prior to June, 1935, formed a voluntary association, loosely knit, in an effort to cement and control the movement of household goods from the warehouse of one member to the warehouses of others in a distant city. The National Association, the applicant, neither owned, nor operated, any vehicles prior to the effective date of the Motor Carrier Act, engaged no drivers and was a non-profit organization controlled solely by its members who did the transportation service. We submit that the quotation from this case is wholly in line with the facts and the law.

Counsel also cite the case of **Acme Fast Freight, Inc., v. United States**, 30 F. Supp., 968, affirmed per curiam, 309 U. S., 638. In that case the **Acme** was merely a freight forwarder, but the right to use, under the Motor Carrier Act, independent contractors was recognized.

As the Circuit Court of Appeals in this case found, there was no inconsistency whatsoever in our factual representation to the commission from that in the instant case and the method of operation is authorized by the Motor Carrier Act. The control referred to both in the Motor Carrier Act and in the decisions is that above referred to, is directed toward assurance that the shipper and the carrier will be fairly and justly treated and not discriminated against; and that the general public shall not suffer from the carrier's tort responsibility. When that control is accomplished, the act is satisfied and certainly there cannot be, as suggested by appellant's counsel, any violation of other acts of Congress when this operation is specifically permitted. (See Br., p. 34.)

Again, if the method of operation by means of independent contractors, a method which has again and again been approved by the Interstate Commerce Commission in granting certificates of compliance under the grandfather's clause, is not in accordance with the Motor Carrier Act and the regulations of the Interstate Commerce Commission, such matter is for the consideration of that body. It is certainly not within the taxing arm of the appellant to force a renegotiation of Greyvan's contracts with its truckmen so as to create a system whereby the Government may levy a tax under the Social Security Acts.

ALLEGED AGREEMENT WITH RESPECT TO THE ENFORCED RETURNS.

Counsel for the appellant claim that Treasurer Shearer agreed to the method of arriving at the enforced returns. Without questioning whether such an agreement would be beyond his authority, no such agreement was made. Such an agreement was expressly denied by Shearer (R., 141) and the appellant put on no witness to prove the contrary. The effect of the testimony was, that if the plaintiff was liable for the tax, the amount was not controverted. The court sustained our objection to the question as to whether there was "controversy about the amount of wages." (R., 141.) Furthermore, we introduced no evidence as to the correctness or incorrectness of the computations but content ourselves on the proposition that there was no wage paid, and there is no tax payable because the truckmen were not employees within the meaning of the Social Security Act. Why counsel insist upon it we cannot understand, because, if there is a liability for the tax such liability exists irrespective of any agreement by Treasurer Shearer.

The District Court found that the amount assessed was "an arbitrary sum, arbitrarily arrived at" (R., 226) and the Circuit Court of Appeals agreed. (R., 258.)

DISCUSSION OF CASES CITED BY APPELLANT.

It is difficult and would unduly lengthen this brief to discuss at length the many cases cited by counsel for appellant. Many of them have no application whatsoever to the facts found in the case at bar. We shall not attempt to distinguish them separately except as we have heretofore handled them, but shall classify them as follows:

Tort cases. As we have heretofore pointed out, tort cases are not in point. The Social Security Acts do not define the word "employment" but leave it to be defined as in common parlance. As has been said, it is not a "work of art". Each case must stand upon its own facts. Discussion on the point will be found in most of the cases cited in our brief.

The tort cases cited by counsel and not in point are as follows:

Singer Mfg. Co. v. Rahn, 132 U. S., 518;
Railroad Co. v. Hanning, 15 Wall., 649;
Casement v. Brown, 148 U. S., 615;
Gulf Refining Co. v. Brown, 93 F. 2d, 870 (C. C. A. 4);
Western Express Co. v. Smeltzer, 88 F. 2d, 94 (C. C. A. 6), distinguished by that court in **United States v. Mutual Trucking Co.**, 141 F. 2d, 655.

Decisions Under Other Statutes.

The following cases involved considerations of the National Labor Relations Act or the Fair Labor Standards Act and are not in point because those acts adopt a very inclusive definition of employment entirely different

from the common law and from that used in the Social Security Acts.

See:

United States v. Davis, 154 F. 2d, 314;
Glenn v. Beard, 141 F. 2d, 371, writ of certiorari denied;
National Labor Relations Board v. Hearst Publications, 322 U. S., 111;
Williams v. Terminal Co., 315 U. S., 386.

Decisions Under State Unemployment Acts.

Decision under many of the state unemployment acts would be inapplicable because of the inclusion therein of the so-called "Three Test Provisions". Of such character is **Electrolux Corp. v. Board of Review**, 129 N. J. L., 154, 28 Atl. (2d), 219.

Decisions Under Federal Unemployment Insurance Act.

Cases such as **Grace v. Magruder**, 148 F. 2d, 679 (App. D. C.), and **United States v. The Vogue, Inc.**, 145 F. 2d, 609 (C. C. A. 4), are illustrative of cases wherein nothing save menial services were performed and no equipment of value is furnished, no responsibility assumed, where the service is performed under the immediate supervision of the taxpayer, or where payment for the service was made direct by the taxpayer. In such cases there is a vast distinction between those and the operation involved in the instant case.

In various other cases cited by the appellant, the taxpayer was held to sustain an independent contractor relationship and recovery was granted. See:

Ridge Country Club v. United States, 135 F. 2d, 718 (C. C. A. 7);
Williams v. United States, 126 F. 2d, 129 (C. C. A. 7);
Texas Co. v. Higgins, 118 F. 2d, 636 (C. C. A. 2);
United States v. Aberdeen Aerie, 148 F. 2d, 655;
Nevius v. Rothensis, 58 F. Supp., 460, affirmed 151 F. 2d, 189.

CONCLUSION.

We respectfully submit that the relationship found by the District Court and affirmed by the Circuit Court of Appeals was fully supported by the evidence and established that of independent contractor and not employer-employee; and there is no application whatsoever of the Federal Unemployment Tax or Federal Contribution Tax Acts. All other questions discussed are mainly incidents to the main proposition and need not here be again reviewed.

We respectfully submit that the law applicable to this case may be concretely stated as follows:

Indivisible compensation paid under a contract, which calls for both personal service and the use of equipment furnished by the party rendering such service, is not "wages" within the meaning of that term as defined in the Social Security Acts of Congress.

The owner of motor equipment who, under contract, furnishes his own motor truck (together with certain moving equipment), including its fueling and maintenance, to an interstate carrier engaged in moving commodities, principally household goods, from point to point within thirty-eight states and the District of Columbia and hauls with such motor equipment freight

solicited by such interstate carrier from point to point as directed, for which he is compensated by a percentage equivalent to 50% or more of the total revenue received is an independent contractor and, as such, is not within the Social Security Acts of Congress, which levy assessments solely upon **wages** paid with respect to **employment.**

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APPENDIX A.

DISCUSSION OF THE STATE OF THE RECORD.

At the pre-trial conference plaintiff was ordered to provide for interviews with the owner-drivers and other of plaintiff's witnesses. (R., 22, 23.) Such arrangement was made. Forms and contracts introduced in evidence herein, including the Manual for Truckmen (R., 276), were furnished counsel for the appellant but the appellant failed to approve the stipulation of facts covering the entire case as proposed by the plaintiff. (R., 21, 132.) A limited stipulation of facts was agreed upon. (R., 22 to 93.) This stipulation in the main was limited to the arbitrary method of preparation of the enforced returns and other facts which appeared upon the record of the appellant. (R., 22-27.)

(R., 29-93.) Exhibits A to I, inclusive (being the enforced returns none of which were signed by appellee), forming part of the stipulation, contain forms which are rather difficult to understand without seeing their original makeup. In each of these exhibits so attached to the agreed statement of fact the so-called "Employees Account No." appearing on the left-hand side of the form and which refers to his social security number is returned as "Unknown". (E. G., See Exhibit G., R., 45.) The name inserted under the heading "Name of Employee" is the name of the truckman (independent contractor) and under the column "Correct Amount of Wages" is inserted a fractional part of the contract payments made to the truckman pursuant to the contract with him. This arbitrary method of the collector in ar-

riving at said amount is shown in the stipulation (R., 25-6) and also appears in the findings of facts. (R., 322.) The method of arriving at the "wage" alleged to have been paid, was by taking the union wage scale on the basis of what a man, if in employment, should have earned and assessing the tax on the amount thus arbitrarily obtained. (R., 25.)

The truckmen were obliged from time to time, in the [redacted] where they made deliveries of goods or secured loadings, to employ labor on a temporary basis for a short time to assist them in moving the household goods into or out of the van and properly packing them for transportation. The collector, as to such alleged employees, assumed that the helpers' wages would be 41.67 per cent of the amount determined and set up by him as the truckmen's "wages". (R., 26.)

As will be noted we have a duplication of exhibits by lettering, the first set (A to I) being attached to the agreed statement, and being the enforced returns (R., 28-93); and the second set being A to K, introduced at the trial.

As to the facts not stipulated, plaintiff produced witnesses to show the method and manner of conducting the transportation business (R., 95-207), with particular reference to the independent contractors of whom there were 50 to 60. (R., 143.)

The following exhibits were offered by the plaintiff and received in evidence.

(R., 121, 131, 265.) Exhibit A, which was the Truckman's Agreement.

(R., 122, 275.) Exhibit B is a copy of "Instructions to Truckman" which indicates to him where he will pick

up a load and to where it will be delivered, together with any particular information which may be necessary for him to have in order to accomplish the object of the contract, delivery.

(R., 122, 275.) Exhibit C, which is a sample of the shipping order, which serves the purpose of a bill of lading. The truckman receipts for the goods unless the plaintiff happens to have at that point a branch office which does the receipting.

(R., 123, 124, 275.) Exhibits D and F, which illustrates the method and manner of making payments to the truckman. It is an "Accounts Payable Voucher". The voucher shows the entire amount coming to the truckman under the contract for the current month, less previous advancements during the month.

(R., 123, 275.) Exhibit G, which is exemplary of the monthly statements made up and delivered to the truckman, which shows the net amount due and payable to the truckman, Parsley, for the transportation accomplished during the monthly period. The statement shows the amounts payable to the truckman on the shipments involved. It shows payment to him of 50 to 70% of the tariff charges collectible by appellee and a total amount payable for the month of September, 1941, of $705.41. In addition, for the same month, he was paid a bonus of $86.16.

(R., 126, 274.) Exhibit H shows the method and manner of making the bonus payments to the truckmans. This payment was to truckman Parsley for $86.16 for September, 1941.

(R., 144; 275, 276.) Exhibits J and K show summaries of amounts paid for transportation service to

rious truckmen, Parsley and Bossert, over various pe-
ods. (R., 126.) Bossert for May, 1942, was paid gross
rnings of $1729.38, and Parsley for May, 1942, was
id gross earnings of $1716.44.

The appellant's exhibits numbered 1 to 15 inclusive
e described as follows:

Exhibit 1 (R., 112, 113, 182, 276, 368) being the
anual for Truckmen which was not enforced and was
sregarded. Attention is directed to pages 341 and
is giving names and location of branch offices, or park-
g lots, where accommodations could be had. These
commodations were ordinarily donated by the owner
f the parking lot with an eye to the possible sales of gas
nd oil (R., 165) and provided accommodations where
he owner-operator might sleep in his truck and guard
is load (R., 104), for which he had assumed responsi-
lity. Other companies use the same lots (R., 169) men
anted for loading and unloading congregate there and
re available to all the companies (R., 165).

Exhibit 3 (R., 199, 368) being page from Chicago
elephone directory showing Greyvan's ad and a pic-
ure of one of the vans.

Exhibit 4 (R., 174, 368) being the union contracts in
wo parts:

First (R., 368) which is a separate contract between
he van drivers, chauffeurs, piano, furniture movers,
ackers and helpers, Local Union 711, etc., covering the
dependent contractors or truckmen.

Second (R., 374) being the supplemental contract of
e same union with respect to employees of the com-
ny driving company-owned trucks.

Exhibit 5 (R., 200, 274) being a photograph of the tractor and front portion of the trailer of a Greyvan outfit.

Exhibit 6 (R., 200, 374) being another photograph of the same van.

Exhibit 7 (R., 194, 375) being a reproduction of a form identified by witness Sahlgaard as one of the forms he used respecting owner-operated trucks, soon discontinued by reason of objection of the owner-operators who had the bill to pay. (R., 193, 195, 196, 197.)

Exhibit 8 (R., 194, 379) being physical inspection report identified by the same witness and suffering same fate.

Exhibits 9 to 14, received under objection (R., 200 to 204, 379 to 395) being a portion of the proceedings before the Interstate Commerce Commission under application for grandfather's rights.

Exhibit 15 (R., 204, 205, 395) and being form of application for identification plates to Interstate Commerce Commission submitted pursuant to a rule by the Division of Motor Carriers of the I.C.C.

APPENDIX B.

LIST OF APPLICABLE DECIDED CASES.

Transportation Cases:

The following cases involving transportation, most of which are by common carriers, are in support of the plaintiff.

United States v. Rosenbloom Truck Lines, 315 U. S., 50, 86 Law Ed., 671 (1942);
Thompson v. United States, 321 U. S., 19, 88 Law Ed., 513;
United States v. Mutual Trucking Co., 141 F. 2d, 655 (C. C. A. 6, 1944), affirming 51 F. Supp., 114;
Midwest Haulers, Inc., v. Brady, 128 F. 2d, 496 (C. C. A. 6, 1942);
Magruder v. Yellow Cab Co., 141 F. 2d, 324 (decided 1944, C. C. A. 4), affirming 49 F. Supp., 605;
United States v. Davis, 154 F. 2d, 314 (U. S. Ct. of Appeals, Dist. Columbia, 1946);
Commercial Motor Freight, Inc., v. Ebright, 143 O. S. 127; 54 N. E. (2d), 297, 151 A. L. R., 1321.

Compare:
Columbia River Packers' Assoc. v. Hinton, 315 U. S., 143, 86 L. Ed., 750.

Decisions by Circuit Court of Appeals Involving Unemployment, Social Security and Similar Acts:

United States v. Mutual Trucking Co., 141 F. 2d, 655 (C. C. A. 6, 1944), affirming 51 F. Supp., 114;
United States v. Aberdeen-Aerie, 148 F. 2d, 655;

Nevius v. Rothensis, 58 F. Supp., 460, affirmed 151 F. 2d, 189;
United States v. Davis, 154 F. 2d, 314 (U. S. Ct. of Appeals, Dist. Columbia, 1946);
McGowan v. Lazeroff, 148 F. 2d, 512 (C. C. A. 2, 1945), affirming D. C. of N. Y.;
Glenn v. Standard Oil Co., 148 F. 2d, 51 (C. C. A. 6, 1945), affirming 52 F. Supp., 755;
Spillson v. Smith, 147 F. 2d, 727 (C. C. A. 7, 1945), affirming D. C. of N. Y.;
Glenn v. Beard, 141 F. 2d, 376 (C. C. A. 6, 1944), cert. denied 323 U. S., 724;
Magruder v. Yellow Cab Co., 141 F. 2d, 324 (C. C. A. 4, 1944), affirming 49 F. Supp., 605;
Ridge Country Club v. United States, 135 F. 2d, 718 (C. C. A. 7, 1943);
Fahs, Coll., v. Orange State Oil Co., 138 F. 2d, 743 (C. C. A. 5, 1943), affirming 52 F. Supp., 509 (1942);
American Oil Co. v. Fly, Coll., 135 F. 2d, 491 (C. C. A. 5, 1943, reversing D. C. of Miss.);
Radio City Music Hall Corp. v. United States, 135 F. 2d, 715 (C. C. A. 2, 1943), affirming 50 F. Supp., 328, on summary judgment;
Anglim, Coll., v. Empire Star Mines Co., Ltd., 129 F. 2d, 914 (C. C. A. 9, 1942);
Midwest Haulers, Inc., v. Brady, 128 F. 2d, 496 (C. C. A. 6, 1942);
Williams v. United States, 126 F. 2d, 129 (C. C. A. 7, 1942), reversing 38 F. Supp., 536 (certiorari denied 317 U. S., 655);
Indian Refining Company, et al. v. Dallman, Coll., 119 F. 2d, 417 (C. C. A. 7, 1941), affirming 31 F. Supp., 455;
Government Personnel Automobile Assoc. v. United States, 124 F. 2d, 99 (C. C. A. 5, 1941);
Texas Company v. Higgins, 118 F. 2d, 836 (C. C. A. 2, 1941), affirming 32 F. Supp., 428.

Decisions by District Courts Involving Unemployment, Social Security and Similar Acts:

Nebraska National Hotel Co. v. O'Malley, 63 F. Supp., 26 (D. C. Neb., 1945);
Emard v. Squire, Coll., 58 F. Supp., 281 (W. D. of Wash., 1945), citing Columbia River Co. v. Hinton, 315 U. S., 143;
Gulf Oil Corp. v. U. S. A., 57 F. Supp., 376 (W. D. of Pa., 1944);
Hirsch v. Rothensies, 56 F. Supp., 92 (E. D. of Pa., 1944);
Brown & Sons Lumber Co. v. U. S., 55 F. Supp., 103 (W. D. of Ky., 1944);
Los Angeles Athletic Club v. U. S., 54 F. Supp., 702 (S. D. of Calif., 1944), appeal dismissed, 144 F. 2d, 352;
Standard Oil Company v. Glenn, Coll., 52 F. Supp., 755 (W. D. Ky., 1943), affirmed 148 F. 2d, 51;
The Spirella Company v. McGowan, Coll., 52 F. Supp., 302 (W. D. N. Y., 1943);
Yellow Cab Company v. Magruder, 49 F. Supp., 605 (D. C. of Maryland, 1943), affirmed 141 F. 2d, 342;
Biltgen v. Reynolds, Coll., 58 F. Supp., 909 (D. C. of Minn., 1943);
Burruss v. Early, Coll., 44 F. Supp., 21 (W. D. of Va., 1943);
Orange State Oil Co. v. Fahs (D. C. Fla., 1942), 52 F. Supp., 509, affirmed (C. C. A. 5), 138 F. 2d, 743;
In the Matter of the Ten Eyck Company, 41 Supp., 375 (N. D. N. Y., 1941);
Kentucky Cottage Industries, Inc., v. Glenn, Coll., 39 F. Supp., 642 (W. D. of Ky., 1941), appeal dismissed.

Decisions Under State Unemployment Acts:

We are supported by the following cases arising under various state unemployment compensation acts:

Bonifas-Gorman Lumber Co. v. Michigan Unemployment Compensation Commission, 313 Mich., 563, 213 W., 2d, 188 (1946).

Ozark Minerals Co. v. Murphy, Director, 51 N. E. (2d), 197, 348 Ill., 94;

Schatz, Pollack Wollen Co., Inc., v. Murphy, 51 N. E. (2d), 145, 348 Ill., 218;

Crossett Lumber Co. v. McCain, Comm., 170 S. W. (2d), 64 (Sup. Ct. of Ark., 1943), and 174 S. W. (2d), 174 (1943);

Southern Kraft Corp. v. McCain, 171 S. W. (2d), 947 (Sup. Ct. of Ark., 1943);

Texas Co. v. Wheeless, 185 Miss., 799, 187 So., 880;

Rochester Dairy Co. v. Christgau, 14 N. W. (2d), 780 (Sup. Ct. Minn., 1944).

We have included in the foregoing list no cases in which Congress or the General Assembly of any state has, by definition, defined "employment" or "employee" other than it was defined at common law; as illustrated by the decision in Walling v. American Needlecrafts, 139 F. 2d, 60 (6 C. C. A., 1943) and National Labor Relations Board v. Hearst Publications, 322 U. S., 111. And, as to state unemployment compensation laws, where the "three tests" provisions were adopted, as found in the cases cited in the Hearst case, pages 121, 122.